Supreme Court, U.S.
FILED
04 101 JUL 16 2004
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, PH.D., Secretary, DOC; DAVID DiGUGLIELMO, Superintendent, SCI-Graterford; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

ARNOLD HOLLOWAY,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. Does the federal Constitution prohibit state courts from requiring that Batson claimants make a minimally adequate record showing the accused lawyer's pattern of peremptory strikes?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

2. Where a lawyer is accused of discrimination in his use of peremptory challenges, does the federal Constitution render irrelevant certain circumstantial evidence of his intent, including that he accepted or rejected other jurors of the same race?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

3. When a counseled state criminal defendant files a "supplemental" appellate brief that is improper and late under state rules, and which the state courts never mention or review, are the claims therein "exhausted" for the purposes of federal habeas review?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit.)

LIST OF PARTIES

Petitioners:

Jeffrey A. Beard, Ph.D, Secretary of the Pennsylvania Department of Corrections; Mr. Beard succeeded Martin Horn, an original respondent in the Third Circuit Court of Appeals, in that capacity.

David DiGuglielmo, Superintendent of the State Correctional Institution at Graterford; Mr. Diguglielmo succeeded Donald Vaughn, an original respondent in the Third Circuit Court of Appeals, in that capacity.

The District Attorney of the County of Philadelphia.

The Attorney General of the State of Pennsylvania.

Respondent:

Arnold Holloway.

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ORDERS AND OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Third Circuit, granting the petition for writ of habeas corpus and reversing the order of the district court, is dated January 22, 2004, and is reported at 355 F.3d 707. It is reprinted in the Appendix at App. 3-45. The March 3, 2004, order of the Third Circuit denying the state's Motion for Rehearing *En Banc* is reprinted at App. 1-2. The August 27, 2001, order of the district court denying the petition for writ of habeas corpus with respect to Holloway's trial, but granting it with respect to sentencing, is reported at 161 F. Supp.2d 452, and is reprinted at App. 46-303.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant. Petitioners seek review of the order of the Third Circuit dated January 22, 2004, reversing the order of the district court, and granting the writ and a new trial. The court denied *en banc* rehearing on March 3, 2004. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, which provides, in relevant part:

> **Section 1.** ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d), which provides, in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; ...

STATEMENT OF THE CASE

On the night of May 16, 1980, respondent Arnold Holloway and one other man tied up 17-year-old Richard Caldwell in the back of a van, tied a belt around his neck and pulled it tight, and then killed him with a point-blank shotgun blast. The killers left Caldwell's body in a gutter. This was a drug murder – Caldwell had recently been selling drugs for a drug gang headed by Leroy Johnson, and he owed the gang money. Johnson ordered Holloway, a member of the organization, to kill Caldwell. Several years later, after a long investigation, Holloway confessed to police.

A Philadelphia jury convicted Holloway of first degree murder in May of 1986. Following a penalty hearing, the same jury sentenced Holloway to death. He received an additional aggregate sentence of twelve and one-half to twenty-five years in prison on his related convictions.

Holloway has spent almost twenty years attacking his conviction and sentence. First, he filed post-trial motions, which the trial court denied after a hearing in 1987. Holloway took a direct appeal, and the Pennsylvania Supreme Court affirmed the conviction and sentence. Commonwealth v. Holloway, 572 A.2d 687 (Pa. 1990). On May 3, 1991, Holloway filed a *pro se* petition for collateral relief under the Pennsylvania Post-Conviction Relief Act, 42 Pa. C.S. § 9541 *et seq.* ("PCRA"). Counsel was appointed, and the petition was supplemented and amended several times. The PCRA court held an evidentiary hearing, and subsequently denied relief. The Pennsylvania Supreme Court once again affirmed. Commonwealth v. Holloway, 739 A.2d 1039 (Pa. 1999).

Next, Holloway sought relief in federal court, filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 on April 3, 2000. This petition contained eighteen claims for relief; together with the supporting memorandum of law and reply brief, Holloway presented the district court with approximately 300 pages of briefing, not including a separate discovery motion. On August 27, 2001, the district court issued a long and thorough opinion denying Holloway a new trial but granting the writ with respect to the sentencing phase. The court held that trial counsel had been ineffective for failing to investigate and present sufficient evidence of Holloway's background and mental health as potential mitigation. App. 300.

Both parties filed notices of appeal. The Third Circuit granted Holloway a Certificate of Appealability on six separate issues, including Batson. After voluminous briefing and oral argument, the panel reversed the district court and granted a new trial on Batson grounds. (The Court of Appeals did not reach any of the other claims.) The

Commonwealth sought rehearing, which was denied on March 3, 2004.

I. Procedural history of the *Batson* claim.

Trial counsel did not object to the prosecutor's use of peremptory strikes until the second day of *voir dire* – after nine jurors were already chosen, and the Commonwealth had used eight peremptory challenges (out of a possible 20). App. 104. At the point when Holloway lodged his objection, the trial record reflects only the race of the nine jurors already chosen (seven whites and two blacks), and it does not establish the racial composition of the other venirepersons. The court denied Holloway's subsequent motion for a mistrial. Id. As the *voir dire* continued, defense counsel noted for the record the race of some (but not all) of the venirepersons, but did not renew his objection. App. 105-107.

In post-verdict motions, defense counsel merely alleged, in one sentence, "[t]hat the Commonwealth systematically excluded all Black jurors by using his peremptory challenges." See Motion For New Trial And/Or Arrest of Judgment, at 3, ¶12. A. 405.[1] The trial court summarily dismissed this undeveloped, unsupported, and factually incorrect claim. See Post-Trial Opinion at 5, S.A.14.[2] ("Defendant's points 1-3, 12 and 14 are general unspecific allegations of error which will not be addressed in

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[1] Citations to "A." refer to the multi-volume appendix filed with the Third Circuit.

[2] Citations to "S.A." refer to the Commonwealth's one-volume supplemental appendix, filed with the Third Circuit.

this Opinion. This Court will not comb the record in an attempt to uncover facts and/or legal rationale in support of these claims.") On direct appeal, Holloway's counsel did not raise the Batson issue, nor did he raise a claim of trial counsel's ineffectiveness in failing to adequately preserve (or make a record in support of) the Batson issue. App. 107.

On state collateral review, represented by yet another attorney, Holloway attempted to cure his waiver by pursuing a claim of trial and appellate counsel ineffectiveness in failing to adequately preserve and argue the Batson issue. See Amended Petition Under Post Conviction Relief Act, at 3. S.A.110. This claim was entirely based on the prosecutor's pattern of strikes, and Holloway made only two factual assertions: "The Trial Court erred in allowing the Prosecutor to peremptorily strike ten (10) perspective [sic] jurors who were black," S.A. 110, and "[o]nly two out of ten jurors chosen for trial were black, the other ten were white," id. Both of these statements were incorrect.[3] No other information was given – for example, how he had arrived at those numbers, or the race of the jurors *accepted* by the prosecution, or the racial composition of the venire. At the PCRA evidentiary hearing on February 10, 1997, counsel rested on the existing record without attempting to supplement the Batson record in any way. App. 127. In fact, the Commonwealth is unaware of *any attempt* by PCRA counsel to supplement the record on the Batson issue *in any way*, either at the hearing or through other means. The PCRA court, not surprisingly, rejected the factually and legally undeveloped ineffectiveness/Batson claim. App. 108-109

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[3] Holloway also listed the names of the jurors who were struck by the prosecution.

n.30. As explained further below, the state supreme court rejected the Batson claim on PCRA appeal because there was an inadequate record. 739 A.2d at 1045.

The Commonwealth objected to Holloway's belated attempts to develop a record in this federal habeas action. Nevertheless, the district court accepted more evidence. First, the parties entered a stipulation as to the race of the jurors in this case (largely taken from the prosecutor's contemporaneous notes), as well as the race of those panel members dismissed for cause, hardship, or by agreement, and those struck peremptorily by both sides. A.663-70. The stipulation establishes (among other things) that three African-Americans served on Holloway's jury. Second, the district court held an evidentiary hearing to take the testimony of Holloway's direct appeal counsel, Robert Redmond, Esq. Mr. Redmond testified, and the district court found, that he did not raise the Batson claim on appeal because the record had not been properly developed, and he believed the claim to be weak. App. 142-43.

In sum, the Batson claim was rejected during *voir dire*, at post-verdict motions, at the PCRA stage, on PCRA appeal, and by the district court. Holloway failed to develop a meaningful record in state court and failed to demonstrate to the federal district court, even after a hearing, that any jury discrimination had occurred or that direct appeal counsel had been ineffective for abandoning the claim. The Third Circuit, however, granted a new trial on the Batson claim, holding that the claim had been exhausted on direct appeal, the state court was wrong to require a more developed record on collateral review, and evidence about the race of the jurors whom the prosecutor *accepted* – as well as other circumstantial evidence – was irrelevant.

REASONS FOR GRANTING THE WRIT

I. States may require that *Batson* claimants make an adequate record, including the race of the jurors struck and accepted by the accused lawyer.

This case is about the kind of evidence that is relevant to a claim of discriminatory peremptory challenges under Batson v. Kentucky, 476 U.S. 79 (1986), the kind of record a Batson claimant must present on appeal, and the power of state courts to set and enforce their own appellate rules. The Third Circuit has taken an extremely narrow view of Batson relevance, which violates both precedent and common sense, and has restricted the ability of appellate courts to require that Batson claimants make an adequate record. In the process, the decision below threatens to disrupt the administration of Batson in the Pennsylvania state and federal courts, not to mention the rules of exhaustion.

The Third Circuit's first two errors arise from its cramped view of what constitutes proper evidence of jury discrimination. The question of discriminatory intent can be difficult to resolve, because direct evidence of intent is rare. In Batson itself, this Court recognized the difficulty, and prescribed a "sensitive inquiry" that takes into account "all possible explanatory factors in the particular case." 476 U.S. at 93, 95 (quotation omitted). The Court also explicitly declined to implement a set of inflexible rules, leaving the administration of Batson to states and jurisdictions across the country. Id. at 99 & n.24. The Court has further recognized that this built-in flexibility includes the power to fashion rules regarding Batson *evidence*. Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 631 (1991) (Batson left to trial courts "to develop evidentiary rules" for its implementation).

In furtherance of these principles, the Pennsylvania Supreme Court has long insisted that a litigant who loses a Batson claim at trial, and seeks to renew it on appeal, must preserve a record that can support a minimally "sensitive inquiry" into the question of discrimination. The requirement is neither surprising nor onerous. All the Batson claimant must do is identify the race of the jurors struck by the alleged discriminator, and those accepted by him. Holloway, 739 A.2d at 1045, citing Commonwealth v. Bronshtein, 691 A.2d 907 (Pa.), cert. denied, 522 U.S. 936 (1997). See also Commonwealth v. Spence, 627 A.2d 1176, 1182-83 (Pa. 1993).[4] Without such evidence, there is no way of knowing the accused lawyer's pattern of peremptory challenges. It is only common sense that a prosecutor who accepts a number of African American jurors may not be acting out of racial animus if he accepts others.

In its opinion below, the Third Circuit has held that this record-making requirement, invoked often by the Pennsylvania courts, violates Batson. This Court should

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[4] The requirement is generally stated this way: "In order to establish a cognizable Batson claim on appeal, a defendant is required to make a record specifically identifying the race of all the venirepersons stricken by the prosecution, the race of the jurors acceptable to the prosecution who were stricken by the defense and the racial composition of the jury selected." Commonwealth v. Hackett, 735 A.2d 688, 694 (Pa. 1999), cert denied, 528 U.S. 1163 (2000). This amounts to the race of the jurors rejected by the prosecutor, and those accepted by him, because this latter group ends up either on the jury or challenged by the defense.

grant *certiorari* to reaffirm the principle that courts making a Batson decision should take into account "*all* relevant circumstances," 476 U.S. at 96 (emphasis added), rather than a narrow slice of that evidence; in addition, state and federal appellate courts may require a minimally adequate record to allow a sensitive Batson inquiry.

The Third Circuit's extremely narrow view of Batson relevance allowed it to ignore Holloway's failure to make a record in state court. His trial counsel identified the race of only a handful of venirepersons. His post-verdict motions relied on a bald, false allegation that blacks were completely excluded from the jury. Holloway's new counsel abandoned this shaky claim completely on direct appeal. During state collateral review, Holloway made another bare-bones Batson allegation, this time asserting that two of the twelve deliberating jurors were black. This was also *wrong*. Holloway made no attempt to supplement the record, even though he had an evidentiary hearing. On collateral appeal, Holloway abandoned his assertions about the number of African-Americans on the jury (probably because he did not know the correct number). He alleged for the first time, more than a decade after trial, that eleven out of the prosecutor's twelve peremptory strikes were used against African-Americans, A.495, and belatedly asked for an evidentiary hearing even though he had plainly waived any further opportunity to present evidence. The state has plainly been prejudiced by the passage of time: At this point, the prosecutor is no longer available to explain his peremptory challenges, even if he could remember them.[5] This lack of

[5] The parties stipulated before the district court that the trial prosecutor is now disabled and unable to provide meaningful testimony about his jury selection. App. 138.

record, attributable to Holloway's failure to *make* a record, should have precluded any Batson hearing in federal court, let alone relief. 28 U.S.C. §2254(e)(2); Michael Williams v. Taylor, 529 U.S. 420, 436-39 (2000).

The state supreme court was not impressed by Holloway's lack of effort. The Court held on collateral appeal that he could not possibly be entitled to relief because he had not preserved an adequate record. This was not a surprising or draconian result – it is common sense. After all, the thrust of Holloway's claim was that the prosecutor had used a surprisingly high proportion of his challenges to remove African Americans from the jury, and that discrimination was the probable explanation. But Holloway made no representation at all about the jurors whom the prosecutor accepted. The appellate court simply could not assess Holloway's Batson claim without this factual support.

The Pennsylvania Supreme Court's common sense "record making" requirement makes sense as a general rule for adjudicating Batson claims on appeal and collateral review. It is easy to accuse the prosecutor of racism once the trial is over. On the other hand, such claims are almost impossible to disprove without a complete record. In order to maintain an efficient justice system – where final judgments are not perpetually open to attack by newly minted Batson claims – it is essential that the record be minimally complete. That way, when a litigant makes a Batson claim on appeal based on his adversary's pattern of strikes, the appellate court knows what the pattern actually *was*.

The Pennsylvania record-making requirement is not contrary to Batson. Indeed, under Batson, courts are not merely permitted, but *required*, to consider all available relevant circumstantial evidence that may render the

accusation more or less believable. 476 U.S. at 93 ("a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available") (quotation omitted); id. at 96-97 (judges "should consider all relevant circumstances" that "might give rise to an inference of purposeful discrimination"). This evidence, also described as the "totality of the relevant facts," includes "proof of disproportionate impact" – that is, the pattern of jurors struck, and those not struck. Id. at 93. In case after case, this Court has examined such evidence in evaluating claims of jury discrimination under Batson. See, e.g., J.E.B. v. Alabama, 511 U.S. 127, 129 (1994) (intentional discrimination on basis of gender in selection of jury violates equal protection; Court notes gender of all jurors struck by both sides); Powers v. Ohio, 499 U.S. 400, 402, 415 (1991) (extending Batson to criminal defendants of different race then excluded juror; Court notes lack of record with respect to jurors accepted by prosecution, and/or challenged by defense; remanded for further proceedings); Ford v. Georgia, 498 U.S. 411, 414 (1991) (in reviewing Swain/Batson claim, Court notes number of black jurors seated on the jury and challenged by both sides, as well as number of peremptories available to each litigant); Griffith v. Kentucky, 479 U.S. 314, 317-19 (1987) (holding Batson retroactive to all cases not yet final at time of decision; notes race of all peremptories used by both sides, and race of jurors who heard case); Batson, 476 U.S. at 83 (noting racial composition of jury).

Petitioners like Holloway who make what is essentially a kind of "disproportionate impact" claim – raising the inference of discrimination from the results of an allegedly discriminatory process – should naturally bear the burden of providing a record from which that impact can be reliably assessed. After all, it is the "general rule that one seeking relief bears the burden of demonstrating that he is entitled to

it," Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 n.5 (1984). Batson claimants should not be allowed to cherry-pick the evidence they want to preserve, submitting only the evidence they want the appellate court to hear.

The Third Circuit labors to portray the record-making requirement as mechanical and arbitrary, a rigid checklist that denies relief to worthy litigants for no good reason. But that is not what happened here – Holloway lost his state Batson appeal because his allegations were unsupported and the record was obviously inadequate, not because of a hypertechnical omission in his briefs. What is more, the Court of Appeals was unable to identify any Pennsylvania case in which this record-making requirement was applied rigidly or unfairly to a litigant who would otherwise have been entitled to Batson relief. There are no such cases; on the contrary, the defendants who have been denied relief on these grounds have all simply failed to make an adequate record. See, e.g., Commonwealth v. Rollins, 738 A.2d 435, 443 & n.10 (Pa. 1999) (record established race of only one juror alleged to be victim of discrimination); Commonwealth v. Porter, 728 A.2d 890, 900 (Pa. 1999) (defense alleged that prosecution used "at least" eight out of sixteen strikes to remove blacks, but record did not confirm even these numbers); Commonwealth v. Baez, 720 A.2d 711, 736 (Pa. 1998) (record established race of only one juror alleged to have been victim of discrimination); Spence, 627 A.2d at 1182 (record did not reflect race of six jurors out of ten that Spence alleged were struck because of their race). Yet these convictions, and many others, are potentially threatened by the Third Circuit's ruling.

As part of its attempt to characterize the state supreme court's rejection of Holloway's Batson claim as rigid and technical, the Third Circuit classifies the ruling as procedural

rather than substantive. But when a claim is rejected because a litigant fails to set forth facts that would justify relief, that is a substantive ruling. To the extent that the state court's ruling is in the gray area between substance (rejecting the facts as inadequate) and procedure (the technical prerequisites to review are not met), the presumption is that the state court has rejected the federal claim *on the merits*. See Harris v. Reed, 489 U.S. 255 (1989). The only question here is whether the state court's rejection of the Batson claim was contrary to, or an unreasonable application of, this Court's Batson decisions. 28 U.S.C. § 2254(d)(1); Lockyer v. Andrade, 123 S. Ct. 1166, 1172 (2003) (under amended habeas statute, reasonableness of state court decision is "only question that matters"). See, e.g., Overton v. Newton, 295 F.3d 270, 279-80 (2d Cir. 2002) (where state court rejected Batson claim because of an inadequate record, issue was whether that rejection was a reasonable application of Batson). As explained above, the Pennsylvania Supreme Court's decision was consistent with Batson.[6]

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[6] Even if the state court's ruling was procedural, rather than substantive, the Third Circuit was still wrong to grant relief. In that case, the question would be whether the application of this procedural rule was adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). A rule is inadequate if it creates an unfair or unpredictable barrier to the presentation of a federal claim. See, e.g., James v. Kentucky, 466 U.S. 341, 347-50 (1984) (timely assertion of federal claim should not be blocked by state courts simply because defense counsel referred to court's charge as "admonition" rather than "instruction").

There was nothing freakish, surprising, or needlessly technical about the state court's holding. It is a well-settled

(continued ...)

The record-making requirement is not unique to Pennsylvania. Many other courts have recognized that it is the Batson claimant's burden to make a record, and that the race of the jurors accepted and rejected by the prosecutor should be part of a *complete* record. See, e.g., Overton, 295 F.3d at 279-80 (state court's denial of Batson claim reasonable where defendant had failed to present evidence of the prosecutor's full pattern of strikes); United States v. Sangineto-Miranda, 859 F.2d 1501, 1520 (6th Cir. 1988) (defendant has burden of preserving record of facts relevant to Batson claim, including number of blacks seated on jury, and of jurors struck by both sides); Mitchell v. Rees, 114 F.3d 571, 578 (8th Cir. 1997) (defendant's failure to preserve "all relevant circumstances" pertaining to Batson claim – including prosecution's other strikes – properly defeated claim in state court), cert. denied, 522 U.S. 1120 (1998). Indeed, the Third Circuit has itself implemented a similar

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principle that counsel must make an adequate record to support claims of trial error. It is not much of a leap, reading Batson, to conclude that a minimal record of the peremptories exercised and the jurors seated would be necessary to support a valid claim. Batson himself made this record, as did many other criminal defendants at about the same time. See, e.g., Miller-El v. Cockrell, 537 U.S. 322, 331 (2003); Griffith v. Kentucky, 479 U.S. 314, 316-17 (1987). In any event, it was clear by the time of Holloway's collateral review hearing in 1997 that a complete record of the prosecutor's strikes was a prerequisite to Batson relief. Yet, Holloway made no effort to adduce more evidence during collateral review. The problem here is not adequacy of the state court's rule, but lack of diligence by the defense in supporting its claim.

requirement, which it has applied in other cases. Sistrunk v. Vaughn, 96 F.3d 666, 671 n.5 (3d Cir. 1996) ("Sistrunk was obligated not only to raise his jury selection claim in the PCRA proceeding but also to develop a record there supporting his claim"); Walker v. Vaughn, 53 F.3d 609, 612 (3d Cir. 1995) (Walker did not provide evidence "regarding the number of people on the jury, the number of black jurors, and the number of black individuals who were stricken from the jury", so minimum Batson showing not met); Deputy v. Taylor, 19 F.3d 1485, 1492 (3d Cir.) (without evidence of the pattern of strikes in a particular venire, minimum *prima facie* showing not met), cert denied, 512 U.S. 1230 (1994). Pennsylvania should be able to require the same thing.

The Third Circuit offered several specific reasons for its rejection of the record-making requirement, but none of these are persuasive. First, the court suggested that Batson claimants should not be burdened with this requirement at the first step of Batson's three-part procedure, that is, the *prima facie* stage. The panel suggested that this sort of evidence might be relevant only to Batson's third step – the ultimate decision of whether discrimination took place. App. 42.

But this is a false distinction. This evidence is just as relevant at step one as it is at step three. When a defendant attempts to make out a *prima facie* case of discrimination, the prosecutor can respond by arguing that the evidence does not support an inference of discrimination. Step one does not require *silence* by the accused lawyer. As a practical matter, this distinction also leads to a trap. If this "pattern" evidence is relevant at step *three*, rather than step one, then the dispute is simply postponed. The party accused of discrimination is left at step three without sufficient information to rebut the *prima facie* case, and a new trial is the likely result.

This trap should be avoided. Instead, in light of the rule that an unrebutted *prima facie* case entitles the objector to relief, the requirement of an adequate record should be a threshold matter. Otherwise, the burden on the Batson claimant is improperly lowered – once he makes a *prima facie* showing, the diminished state of the record does not allow an effective reply, and a new trial results. This makes an appellate Batson claim more powerful than a claim actually made when it is supposed to be made, during *voir dire*.

The Third Circuit also suggested that the record-making requirement threatens the principle that discrimination against even one juror violates Batson. But that principle is not in dispute: The question here is the manner in which such a claim may be *proven* once the trial is over, even as to only a single juror. Holloway's claim was premised on the prosecutor's conduct in the *aggregate*. Thus, he tried to make a circumstantial case on collateral review, based on his allegation that the prosecutor used most of his peremptorie against African-Americans. The problem was that the race of a substantial number of venirepersons was not in the record; thus the main assertion upon which this Batson claim was based – the suspiciously large proportion of strikes against blacks – *was unproven*. In fact, he made no attempt on collateral appeal to describe the racial composition of the final jury, or the other jurors accepted by the prosecution. Whether Holloway insisted that one venireperson was the victim of discrimination, or two, or ten, the fact remains that he could not prove his point on an incomplete or incorrect record. Without such a record, any order of relief would be based on speculation.

The Third Circuit's real concern seems to be that the record-making requirement might restrict its ability to grant relief. Nevertheless, as this Court has repeatedly recognized,

states have an interest in the fair and efficient resolution of claims, and they have wide latitude to enforce reasonable restrictions. See, e.g., Coleman, 501 U.S. at 748-51. That is all the Pennsylvania Supreme Court did here. This Court should grant *certiorari* and hear the matter.[7]

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[7] The Third Circuit's concern is perhaps more specific – that this requirement would prevent relief in a death penalty case. After all, the Third Circuit has granted relief in virtually every contested Pennsylvania death penalty case to come before it since the Commonwealth enacted the current death penalty statute about 25 years ago. The only exceptions have come where the court reverses the grant of the writ on one claim, and remands the case to the district court for further consideration of that claim and/or other claims – so relief may eventually issue anyway. Hardcastle v. Horn, 368 F.3d 246, 262 (3d Cir. 2004); Rompilla v. Horn, 355 F.3d 233, 235 (3d Cir. 2004); Whitney v. Horn, 280 F.3d 240, 262 (3d Cir 2002), cert. denied, 537 U.S. 1195 (2003).

Rompilla is of special interest here, because two of the three Third Circuit judges who decided Holloway's case joined a rather extreme anti-death penalty opinion in that case. The Third Circuit in Rompilla narrowly denied relief on a claim of trial counsel's ineffectiveness for failure to investigate and present mitigating mental health evidence – Rompilla's trial counsel had hired two psychiatrists and one psychologist before trial, all of whom found no mental health problems. Rompilla, 355 F.3d at 251. But Rompilla's claim was only narrowly defeated by a vote of 7-5 on a petition for *en banc* rehearing. Rompilla v. Horn, 359 F.3d 310 (3d Cir. 2004) (sur petition for rehearing). Judges McKee and Sloviter – who comprised two-thirds of Holloway's panel – along with one other judge, joined a remarkable opinion in support of

(continued ...)

II. Evidence about the race of jurors who are seated, and other circumstantial evidence relating to the prosecutor's intent, is relevant to a *Batson* claim.

In the opinion below, the Third Circuit declared that certain kinds of evidence are irrelevant to Batson claims. This second error is closely related to the first: Because the Third Circuit has adopted such a narrow, defense-oriented definition of what constitutes "relevant" Batson evidence, it was a logical step to conclude that states cannot require that this extra, irrelevant evidence be part of the record. This Court should grant *certiorari* to correct that first step – and reaffirm that narrow limits on Batson evidence are improper.

First, the court held that the race of jurors accepted by the lawyer accused of discrimination, and seated on the jury or struck by the other side, is *irrelevant*. App. 43. This cannot possibly be right. Courts consider this kind of evidence all the time, and rightly so. For example, it is plainly relevant to a Batson claim if the prosecutor accepts no

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rehearing, comparing Rompilla's trial to the bias-dominated farce endured by the "Scottsboro Boys" in 1931. See Powell v. Alabama, 287 U.S. 45 (1932). The Rompilla dissenters also suggested that the standards of Strickland v. Washington, 466 U.S. 668 (1984), should be modified in death penalty cases, and standards for rehearing such cases should be lowered. 359 F.3d at 310 n.1, 311. It came as no surprise that these same judges held that *this* death-sentenced prisoner was not obligated to make a meaningful record in state court in order to prevail on his claim of jury discrimination.

African-Americans despite many opportunities to do so, thus creating an all-white jury. Criminal defendants should not be prevented from making that argument. The flipside is also true – if counsel accepted *many* African-Americans, and ended up with a jury that was predominantly black, that is also relevant. This may not be dispositive of the Batson issue, but it is plainly probative.

To say that the Third Circuit has created a "circuit split" on this issue is an understatement. The Commonwealth is aware of no other court that has precluded such evidence. But the opinion below is more than a curiosity. Apparently, courts in this circuit – state and federal, appellate and trial – are acting unlawfully if they even *consider* the race of jurors accepted by the lawyer accused of discrimination. The argument is no longer whether such evidence is dispositive – the question is whether this evidence can be discussed at all.

The panel did not seem to fully believe its own holding. For example, the court engaged in juror comparison analysis: That is, it found several black venirepersons whom the prosecutor challenged to be essentially identical to several white jurors whom he accepted. This, the panel concluded, was evidence of discrimination. App. 35. But if the race of other jurors accepted by the prosecution were truly irrelevant, then this sort of comparative analysis would be improper, because the fact that a prosecutor accepted a *white* juror (which the Third Circuit felt free to consider) is logically no more relevant than his acceptance of a *black* juror (which the Third Circuit refused to consider). The relevance of this evidence should not depend on whether it benefits the defense – but that is the only distinction that might explain the Third Circuit's inconsistent approach.

In a separate holding, the court below narrowed the evidence that may be used at "step two" of the Batson inquiry – the opportunity for the party defending the peremptory challenge to provide a "race neutral" explanation for it. The Third Circuit held that these reasons cannot be deduced from circumstantial evidence – these reasons can only come from the accused lawyer himself. App. 36 ("apparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge"). This is especially important where, as here, Batson claims are rejected by the trial court and then litigated on appeal or collateral review. The challenged lawyer may be unavailable or unable to remember why he struck a particular juror. In such situations, circumstantial evidence is critical, and the Batson defender is entitled to rely on it – just as the defense has relied on circumstantial evidence (the pattern of strikes) to establish the inference of discrimination in the first place.

The Third Circuit's "no circumstantial evidence" rule leads to another procedural trap. Where the state courts have rejected a Batson claim and found no *prima facie* case of discrimination, the challenged lawyer is not asked to explain himself, and his race-neutral explanation is not voiced. If the federal court later disagrees and finds a *prima facie* showing, but the lawyer has become unavailable, then according to the Third Circuit the Batson accuser will win by default, without offering more than a *prima facie* inference of discrimination.

This case is a good example of that trap. The Third Circuit believed that the prosecutor may have struck juror John Hackley because of his race. The record, however, contains evidence of reasons *other* than race – for example, Mr. Hackley indicated vaguely that he lived in the neighborhood of the crime, and that he might well have known "some of the people" involved in this case. A.1485.

This possibility was reflected in the prosecutor's contemporaneous notes, where he wrote that Mr. Hackley "knows someone." A.684. But the panel held that this evidence could not even be *considered*. App.35-36.[8]

In Batson this Court held that claims of jury discrimination should be assessed with a "sensitive inquiry" into "all available" evidence. This includes the race of jurors

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[8] The court below emphasized that its inquiry into the Hackley strike was especially circumscribed because the prosecutor had actually offered an explanation for this challenge during *voir dire*. But it is unfair to close the door on other evidence based on this brief exchange, which the court took out of context. What happened is this: Following the prosecutor's peremptory challenge to venireperson Hackley, defense counsel stated, "Let the record show a black juror." App. 29, 34. That was all – this was not even an objection. Without prompting, the prosecutor responded that Mr. Hackley was "a black male juror approximately the same age as defendant." Id. Thus, the prosecutor ironically echoed defense counsel's sole focus on the race of this juror, and followed it with an observation that the juror's race was *not* his sole relevant characteristic. The trial court was silent during this entire exchange; no one asked for more, and the subject of Mr. Hackley was not discussed again. Under the circumstances, where no actual objection was lodged and no one even questioned the prosecutor's brief race-neutral retort – the age of the juror – if this reason is *rejected* years later (as the Third Circuit did) it is simply unfair to prohibit consideration of all other possible explanations. The only reasonable way to assess whether this race-neutral explanation was pretextual, is to examine the other available evidence.

accepted by the alleged discriminator, as well as other circumstantial evidence. This Court should grant *certiorari* and reverse the Third Circuit's attempt to exclude this plainly relevant and necessary evidence.

III. Holloway's supplemental, late *pro se* brief in the Pennsylvania Supreme Court did not "exhaust" the claims therein.

The Third Circuit concluded that it could reach the Batson claim and consider it *de novo* because the claim had been exhausted on direct appeal.[9] But Holloway's counsel did not *raise* the claim on direct appeal. Holloway only included a Batson claim in a late, improper supplemental *pro se* brief that was not even mentioned in the state supreme court's direct appeal opinion. By any reasonable definition – and certainly under this Court's precedent – this was not exhaustion. This Court should grant *certiorari* and say so.

For many years, the rule in Pennsylvania has been clear: Defendants do not have a right to hybrid representation. If they are represented by counsel, they

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[9] This conclusion is critical to the Third Circuit's analysis, because if the Batson claim was *not* exhausted on direct appeal, the most Holloway could logically be entitled to is review of his *ineffectiveness* claim. (That is, his claim that direct appeal counsel should have made the Batson argument.) The Third Circuit did not adjudicate the ineffectiveness claim. Holloway cannot prevail on it because, among other things, the district court found as a fact that Holloway's lawyer on direct appeal had perfectly good reasons for not raising Batson. App. 143-48.

cannot expect to act as co-counsel without special permission. Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993); Commonwealth v. Colson, 490 A.2d 811, 821 (Pa. 1985); Commonwealth v. Williams, 410 A.2d 880 (Pa. Super. 1979). See also Hall v. Dorsey, 534 F. Supp. 507 (E.D. Pa. 1982) (recognizing Pennsylvania rule that defendants do not have right to act as co-counsel); Jabbar- Al Samad v. Zimmerman, 1987 WL 26583, *4 (E.D. Pa. 1987) (same). Because of this rule, federal courts have always held that claims raised by Pennsylvania criminal defendants are *not exhausted* by inclusion in *pro se* appellate briefs filed by Pennsylvania defendants, where those defendants are also represented by counsel. Sweger v. Chesney, 294 F.3d 506, 511, 522 (3d Cir. 2002), cert denied, 538 U.S. 1002 (2003); see also Hall v. Zimmerman, 1986 WL 660 (E.D. Pa. 1986).

Holloway himself was aware of the no-hybrid-representation rule, because he *asked permission* to file his supplemental *pro se* brief eight months after his lawyer had filed the principal brief. A.408-409. In fact, the proposed brief was improper in two ways – it was *pro se* when Holloway was represented by counsel, and it was offered after briefing was closed, in violation of Pa. R. App. P. §2501(a). This motion for permission was not granted, however (despite the Third Circuit's contrary conclusion, discussed below), and the Pennsylvania Supreme Court did not mention those claims in its opinion. Holloway, 572 A.2d 687.

After Holloway's direct appeal had ended, no one believed that these never-mentioned, late, supplemental *pro se* claims had been properly presented to the Pennsylvania Supreme Court. Holloway filed a PCRA petition, and he raised a Batson claim; he litigated the claim as if it had not been raised on direct appeal. The Pennsylvania Supreme

Court did not think the Batson claim had been raised on direct appeal, either; in fact, in its PCRA opinion the Court noted that the Batson claim could only be raised as an ineffectiveness claim – in other words, *it had not been raised on direct appeal*. Holloway, 739 A.2d at 1044. No one disputed this ruling.

When Holloway filed his 82-page Petition for Writ of Habeas Corpus, he raised his Batson claim again – and he *still* did not say that it had been exhausted on direct appeal. A.126-209. In fact, he did not even mention his supplemental *pro se* direct appeal brief at all, let alone insist that he had filed it as a matter of right. Nor did Holloway include this *pro se* brief in his 200 pages of supporting exhibits. When Holloway filed his 90-page supporting memorandum of law, he *still* did not mention it. After the Commonwealth responded and pointed out that the Batson claim had only been raised during PCRA proceedings (that is, not on direct appeal), A.211-12, 271, Holloway *still* did not mention it in his 126-page reply brief.

The very first time Holloway argued that the Batson claim had been exhausted in his supplemental *pro se* brief was during the evidentiary hearing before the district court. App. 120-21 n.38. Robert Redmond, Holloway's lawyer on direct appeal, brought it up during his testimony; he stated that during oral argument, a member of the Pennsylvania Supreme Court (he did not remember which one) had indicated that the *pro se* brief had been "received". A.642. Even if this were entirely credible, Redmond did not testify that the Court *accepted* the brief, or obligated itself to consider its claims, or whether a Justice simply noted the existence of the *pro se* filing, or even whether the Court simply noted that it would take the pleadings under advisement. Certainly there was nothing in the record to

suggest that the *pro se* filing had been accepted for review. (Oral arguments before the Pennsylvania Supreme Court are not transcribed.)

Nevertheless, the Third Circuit held that Holloway's *pro se* supplemental direct appeal brief was properly before the state supreme court. App. 12-17. The panel held that the Pennsylvania Supreme Court was *obligated* to accept it. The court pieced together this secret rule from two sources: First, the Pennsylvania Supreme Court did not explicitly approve the practice of not accepting *pro se* briefs filed by counseled defendants until 1993. See Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993). Second, the Court *has* sometimes considered claims raised in *pro se* briefs. App. 18-19.

Neither of these two rationales is convincing. In Ellis, the Pennsylvania Supreme Court simply applied the longstanding rule that defendants have no right to hybrid representation. 626 A.2d at 1139, citing Commonwealth v. Colson, 490 A.2d 811, 821 (Pa. 1985). The Court in Ellis explicitly approved the Superior Court's reasoning that, as a matter of policy, appellate courts should not review *pro se* briefs filed by represented appellants. 626 A.2d at 1138-39. The Ellis Court believed it was simply applying the general rule, not blazing a new trail; the existence of Ellis does not mean that the law was the opposite before it was decided, or that the general rule against hybrid representation did not apply to appeals. On the contrary, Holloway knew very well that he had no right to file a late supplemental *pro se* brief – that was why he asked for permission to file it.

The panel also cited a number of cases in which the Pennsylvania Supreme Court explicitly accepted *pro se* briefs from represented defendants, in capital cases. The panel reasoned that these were more than exceptions to the general

rule – they made the rule nonexistent. App. 18-20. But no one disputes that the Pennsylvania Supreme Court *could have* reviewed his *pro se* claims. But the Court *did not* grant permission to file the brief. (Furthermore, all but one of these cases was decided *after* Holloway's direct appeal; so even if they created an unspoken policy in favor of hybrid representation, no such policy was in existence when Holloway filed his brief, or when his direct appeal was decided.) The question here is whether acceptance of *pro se* briefs was *automatic*, and it plainly was not.[10]

To overcome these clear problems, the Third Circuit seized upon the testimony of Holloway's direct appeal attorney Robert Redmond that the Supreme Court had "accepted" his *pro se* brief during oral argument. The panel stated that the Commonwealth did not rebut this evidence "or cast any doubt" on it. App. 17. This is wrong, in a number of ways:

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[10] The panel's attempt to cobble together an unspoken rule allowing *pro se* briefs in capital cases, but not in other cases, was especially weak. Certainly no Pennsylvania court has ever made this distinction. Nor do we know whether the Pennsylvania courts actually accept *pro se* briefs more often in death penalty cases than in other cases, which is what the panel seemed to assume. Rather, the Court of Appeals simply picked several death penalty cases, noted that the Pennsylvania Supreme Court explicitly accepted *pro se* briefs in those matters (which it did not here), and made the puzzling logical leap that this demonstrates a *rule* in capital cases that *pro se* briefs are *always* accepted, even where the *pro se* brief is not mentioned at all.

1. This argument is waived. Under the Eastern District's Local Rule of Civil Procedure 9.4(2)(b), a death-sentenced prisoner "*must*," in his petition for habeas relief, "identify at what stage of the proceedings each claim was exhausted in state court ..." This is not optional; it is mandatory. But nowhere in Holloway's lengthy habeas petition, or his even longer supporting memorandum, or in his still longer reply brief (after the Commonwealth had raised the default argument), did Holloway suggest that his Batson claim (or any other claim) was exhausted due to its inclusion in his improper, late *pro se* supplemental brief. In fact, the *pro se* brief was *not even mentioned at all* in the petition, or the memorandum, or the reply.

When Holloway finally raised this exhaustion argument at the evidentiary hearing before Judge Van Antwerpen, the Commonwealth argued that this theory had never been raised before. A.657. Judge Van Antwerpen agreed. App. 120-21 n.38, 141-42 n.56. It is hardly fair to charge the Commonwealth with the failure to respond to this surprise argument and evidence, which plainly violated the applicable rules, which the Commonwealth had no opportunity to investigate or (or even think through) before the hearing, and which the district court dismissed because it had not been timely raised.

2. Holloway litigated the case for years *as if this had never happened.* Holloway, represented by new counsel, vigorously pursued state collateral relief. He raised his Batson claim, but nowhere mentioned that he had "raised it" before. This is important, because the PCRA bars "previously litigated" claims from further review. 42 Pa. C.S. § 9544(a). If he believed that his Batson claim had been raised on direct appeal, he should have explained why it was nevertheless cognizable – presumably, he would have argued that the Court

had improperly failed to "accept" his late *pro se* brief, and the Court could have explained why it had not done so, thus ending the speculation of whether the brief had been properly filed or accepted. (The Commonwealth also could have responded in a meaningful way to these arguments while memories of the direct appeal were relatively fresh.) Once again, however, Holloway led everyone to believe that his Batson claim had *not* been previously litigated. See A.475-76 (in reciting history of direct appeal in PCRA appeal brief, *pro se* supplemental brief is not mentioned; on the other hand, several *pro se* PCRA filings are discussed).

If Holloway believed that his Batson claim had been previously raised and should have been reviewed, he could have made a record by seeking reconsideration or clarification after the direct appeal was over. At the least, he should have mentioned it on collateral review, and his failure to do so was disingenuous and misleading.

3. Even taking Redmond's testimony at face value, Holloway has still not proven exhaustion. At the evidentiary hearing before the district court, Redmond testified that he did not recall the Batson issue coming up at all during oral argument. A.607. The Court merely stated, according to Redmond, that "it would consider all the matters contained in the pleadings set forth," and he assumed the Batson issue was one of them. A.625-26. When pressed, Redmond said that at the conclusion of oral argument, the Court indicated that it would take "all the matters raised under advisement" and that it had "received" the *pro se* brief. A.642. But "receipt" of the late *pro se* brief – assuming this is the precise word used by the Court – is not acceptance, and does not signal that the merits of the claim would be reviewed. Nor does the Court's statement that it would take the pleadings "under advisement" – certainly a common way

to end oral argument – somehow establish that the Batson issue was properly before it.

So even if all of Redmond's testimony is accepted as true, Holloway has *still* not established that the Pennsylvania Supreme Court agreed to hear his Batson claim.[11] The rule against hybrid representation was not overcome, and the Batson claim was not exhausted on direct appeal. The Third

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[11] There is plenty of reason to believe that Redmond's testimony was not true. The best evidence of what actually happened – the state court docket – mentions no "acceptance" of the *pro se* brief. The utter failure of Redmond, Holloway, or any other counsel to take any action when the *pro se* brief was not mentioned in the direct appeal suggests that no one expected it to be mentioned or decided. Finally, Redmond's testimony on this point was not believable, even taken on its own. In the *very same sentence* where he asserted that the Pennsylvania Supreme Court orally accepted the *pro se* brief, he also insisted that the *pro se* brief had been "timely filed." A.626. He also testified that he *relied* on the contents of that brief while writing his own. A.624, 635. These statements are *false*. The *pro se* brief was filed many months *after* Redmond wrote and filed his brief, and long after any conceivable filing deadline had passed. A.635; A.450. Further, on cross-examination, Redmond admitted that in discussing his upcoming federal court testimony with the prosecutor just a few days before the hearing, he (Redmond) did not mention the *pro se* brief, and he even conceded that he had not remembered the *pro se* brief until Holloway's current counsel brought it to his attention. A.631. The newly-minted character of this testimony casts even more doubt on its reliability.

Circuit may have been eager to decide the Batson claim *de novo*, but this finding of exhaustion was plainly improper. This Court should grant *certiorari*.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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(2)
Supreme Court, U.S.
FILED
04 101 JUL 16 2004
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, PH.D., Secretary, DOC; DAVID DiGUGLIELMO, Superintendent, SCI-Graterford; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

ARNOLD HOLLOWAY,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-9009 & 01-9010

ARNOLD HOLLOWAY,

Appellant, No. 01-9009

v.

MARTIN HORN, SECRETARY, DOC;
DONALD VAUGHN, SUPERINTENDENT,
SCI-GRATERFORD; THE DISTRICT ATTORNEY
OF THE COUNTY OF PHILADELPHIA; THE
ATTORNEY GENERAL OF THE STATE OF
PENNSYLVANIA,

Appellants, No. 01-9010

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge,*
SLOVITER, NYGAARD, ALITO,
ROTH, McKEE, BARRY, AMBRO,
FUENTES, SMITH, CHERTOFF,
and COWEN*, *Circuit Judges*

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*Limited to Panel Rehearing Only.

The petition for rehearing filed by appellees/cross-appellants in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Robert E. Cowen
Circuit Judge

Dated: March 3, 2004

ghb/cc: (Billy Nolas, Esq.
Matthew C. Lawry, Esq.
David W. Wycoff, Esq.
Thomas W. Dolgenos, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-9009 & 01-9010

ARNOLD HOLLOWAY,

Appellant, No. 01-9009

v.

MARTIN HORN, SECRETARY, DOC;
DONALD VAUGHN, SUPERINTENDENT,
SCI-GRATERFORD; THE DISTRICT ATTORNEY
OF THE COUNTY OF PHILADELPHIA; THE
ATTORNEY GENERAL OF THE STATE OF
PENNSYLVANIA,

Appellants, No. 01-9010

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 00-cv-01757)
District Judge: Hon. Franklin S. VanAntwerpen

Argued October 27, 2003

BEFORE: SLOVITER, MC KEE and COWEN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on October 27, 2003. On consideration whereof, it is now here ordered and adjudged that the judgment of the District Court entered on August 27, 2001, be and the same hereby is REVERSED and the matter REMANDED. All of the above in accordance with the opinion of this Court. Costs taxed against appellee at 01-9009; each party to bear its own costs at Docket No. 01-9010.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: January 22, 2004

PRECEDENTIAL

Filed January 22, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-9009/01-9010

ARNOLD HOLLOWAY,
Appellant, No. 01-9009

v.

MARTIN HORN, SECRETARY, DOC;
DONALD VAUGHN, SUPERINTENDENT,
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OF THE COUNTY OF PHILADELPHIA; THE
ATTORNEY GENERAL OF THE STATE OF
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District Judge: Hon. Franklin S. VanAntwerpen

Argued October 27, 2003

BEFORE: SLOVITER, MC KEE and COWEN,
Circuit Judges

(Filed: January 22, 2004)

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OPINION OF THE COURT

COWEN, *Circuit Judge.*

A Philadelphia jury convicted Arnold Holloway of first-degree murder for the brutal slaying of Richard Caldwell and imposed a sentence of death. Holloway raises several claims of constitutional error in this federal habeas corpus proceeding. We need only reach his contention that the Commonwealth of Pennsylvania used its peremptory strikes

to exclude African-Americans from the petit jury in violation of the Equal Protection Clause and *Batson v. Kentucky*, 476 U.S. 79 (1986). The District Court held that Holloway procedurally defaulted his *Batson* claim by failing to raise it on direct appeal in state court, and alternatively held that the claim was without merit. We conclude that Holloway exhausted his *Batson* claim both on direct appeal and in state post-conviction proceedings, and committed no procedural default to bar review in federal court. On the merits, the use by the Commonwealth of eleven of its twelve peremptory strikes to exclude African-Americans from the jury, together with the failure to offer race-neutral reasons for the strikes, particularly of venireperson John Hackley, Sr., violated the principles of *Batson*. Accordingly, we will reverse the District Court's judgment and remand for issuance of the writ conditioned upon the Commonwealth's right to conduct a retrial.

I. Background & Procedural History

In the early morning hours of May 16, 1980, Philadelphia police found the body of seventeen-year-old Richard Caldwell on a secluded North Philadelphia street corner, dead from strangulation and two shotgun wounds to the head. The murder remained unsolved until January 1985, when the police arrested a neighborhood heroin dealer, Shirley Baker, who was wanted for sentencing on several drug-related convictions and had become a suspect in the murder. While in custody, Baker told the police that her fellow dealers, Holloway and Danny Freeman, had murdered Caldwell.

According to Baker, Holloway was a middleman who supplied heroin to Baker, Freeman, and Caldwell for street-level distribution. Holloway, in turn, answered to an individual named Leroy Johnson. Johnson came to believe that

Caldwell was "messing up the money" and otherwise interfering with his business plans, and he instructed Holloway to kill Caldwell. Baker claimed that she was in her apartment with Johnson ingesting cocaine around midnight on May 16, when Freeman and Holloway arrived and asked to use Johnson's van. Johnson informed Holloway that Caldwell was in the van, and Holloway replied, "I can take care of that now." Holloway and Freeman retrieved a shotgun from Holloway's upstairs apartment and departed in the van. They returned around thirty minutes later, at which point Holloway whispered with Johnson about having tied up and strangled Caldwell. Holloway, Johnson, and Freeman then left Baker's apartment, with Johnson asking Holloway if he had cleaned up the van.

In May 1985, Philadelphia police located Holloway and took him into custody. According to the Commonwealth's trial evidence, Holloway confessed to the murder while in custody by providing a typewritten statement to Detective Ernest Gilbert, which he refused to sign. Holloway's statement was largely consistent with Baker's account of the murder. Holloway added, however, that he murdered Caldwell because of a threat to his own life from Johnson. He admitted that he and Freeman tied Caldwell's hands together, drove the van several blocks from the apartment, and pushed Caldwell into the street. They strangled Caldwell by taking turns pulling at a belt around his neck, and then shot him twice in the head at close range.

The Commonwealth charged Holloway in the Philadelphia County Court of Common Pleas with first-degree murder, criminal conspiracy, and possession of an instrument of crime. Pretrial litigation arose primarily from the fact that, days prior to Holloway's arrest, a jury had acquitted his alleged accomplice Danny Freeman on charges of murdering

Caldwell. Holloway moved to suppress his custodial statement, claiming, *inter alia*, that he never made it and would not have done so because he knew at the time of his arrest that Freeman had been acquitted. The trial court denied the suppression motion. The trial court also granted a Commonwealth motion to preclude discussion before the jury of Freeman's acquittal. That ruling barred Holloway from arguing that his custodial statement should be disbelieved because he and Detective Gilbert both knew of Freeman's acquittal at the time the statement was purportedly made.

The voir dire examination of prospective jurors, discussed in greater detail below, was conducted over the course of three days. The Commonwealth exercised a total of twelve peremptory challenges, eleven of which were used to strike African-Americans. Holloway, an African-American, raised objections, created a record as to the race of the stricken venirepersons, and moved for a mistrial on the ground that a pattern of purposeful discrimination had been established. The prosecutor responded by explaining his reasons for three of the strikes, but the trial court rendered no express or otherwise articulated ruling on Holloway's objections; instead, it implicitly rejected the *Batson* challenge by letting the matter proceed to trial.

At trial the Commonwealth relied primarily upon the testimony of Shirley Baker and Detective Gilbert. Holloway testified in his own defense, claiming that Detective Gilbert fabricated his custodial statement. Holloway's wife, Delores Kareem, bolstered this assertion by testifying regarding a phone call she received from Holloway shortly after he made the purported statement. Holloway also called as a witness the victim's adopted brother, Alfonso Walker, who testified that other drug dealers were angry with and had assaulted Caldwell shortly before his death. Finally, Holloway

presented an alibi defense, seeking to establish that he was intoxicated and at the home of Carmella Davis the night of the murder, in support of which he presented the testimony of Davis and her then-boyfriend.

The jury convicted Holloway on all counts after a three-day trial. A capital sentencing proceeding was conducted immediately following the verdict. The Commonwealth rested on its trial evidence at sentencing, while Holloway presented his wife as the sole sentencing witness. The jury found the two aggravating circumstances asserted by the Commonwealth: (1) Holloway paid or was paid by another person, had contracted to pay or be paid by another person, or had conspired to pay or be paid by another person for the killing, 42 Pa. Cons. Stat. § 9711(d)(2); and (2) the killing was effectuated by means of torture, *id.* at § 9711 (d)(8). The jury also found the two mitigating circumstances upon which it was charged: (1) Holloway had no significant history of prior convictions (to which the Commonwealth had stipulated), *id.* at § 9711(e)(1); and (2) evidence pertaining to Holloway's character, *id.* at § 9711(e)(8). It concluded that the two aggravating circumstances outweighed the two mitigating circumstances and imposed a death sentence for the murder conviction. The court also sentenced Holloway to consecutive terms of five to ten years for conspiracy to commit murder, and two and one-half to five years for possessing an instrument of crime.

Holloway pursued a direct appeal as of right to the Pennsylvania Supreme Court, which affirmed the convictions and sentences. *Commonwealth v. Holloway*, 572 A.2d 687 (Pa. 1990) ("*Holloway I*"). In 1991, Holloway filed a petition for state-court collateral review under the Pennsylvania Post-Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-9546 ("PCRA"). The trial court denied the petition after an

evidentiary hearing, and the Pennsylvania Supreme Court affirmed. *Commonwealth v. Holloway*, 739 A.2d 1039 (1999) ("*Holloway II*").

On April 4, 2000, Holloway timely filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania, raising sixteen grounds for relief. The District Court conducted a limited evidentiary hearing regarding the purported procedural default of Holloway's *Batson* claim, and thereafter issued an opinion denying relief on all trial-phase claims. *Holloway v. Horn*, 161 F. Supp. 2d 452 (E.D. Pa. 2001) ("*Holloway III*"). The District Court held in pertinent part that the *Batson* claim was procedurally defaulted and, in any event, was without merit. As to the sentencing phase, the District Court concluded that Holloway's counsel provided ineffective assistance in failing to investigate mental-health issues and request the assistance of a mental-health expert. The District Court thus issued the writ conditioned upon the Commonwealth's right to conduct a new sentencing proceeding. Holloway timely appealed (C.A. No. 01-9009), and the Commonwealth timely cross-appealed (C.A. No. 01-9010).

II. Jurisdiction & Standard of Review

We granted Holloway a certificate of appealability to raise six issues on appeal, including whether the Commonwealth used its peremptory strikes in violation of *Batson*.[1] Given our disposition of the *Batson* issue, we need

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[1] The other five issues are as follows: (1) whether the trial court improperly excluded evidence that Holloway and Detective Gilbert were aware of Danny Freeman's acquittal, offered for the

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not address Holloway's remaining claims. Nor do we reach the Commonwealth's challenge on cross-appeal to the District Court's issuance of the writ based on its finding that counsel provided ineffective assistance at sentencing.

We have appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a). We conduct a plenary review of the District Court's legal conclusions and review its factual conclusions for clear error. *Whitney v. Horn*, 280 F.3d 240, 249 (3d Cir. 2002). Our review is also plenary as to the District Court's determinations regarding exhaustion and procedural default. *Id.*; *Hull v. Kyler*, 190 F.3d 88, 97 (3d Cir. 1999).

III. The *Batson* Claim

1. Procedural Default

In *Holloway II*, the Pennsylvania Supreme Court held that Holloway's *Batson* claim was procedurally defaulted,

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limited purpose of showing Holloway's state of mind and the motivation of Detective Gilbert at the time of the supposed confession; (2) whether the prosecutor's guilt phase argument was egregiously improper and violated due process; (3) whether Holloway's conviction of the crime of conspiracy, which was barred by the statute of limitations, violated due process and the ex post facto clause; whether the trial court's instructions on accomplice liability violated due process; and together, whether these violations prejudicially affected the jury's deliberations on the charge of first-degree murder; (4) whether the jury instructions unconstitutionally indicated that the jury had to unanimously find any mitigating circumstances before giving it effect in its sentencing decision; and (5) whether the District Court erred in holding these claims procedurally defaulted.

because it had not been raised before the PCRA trial court. In *Holloway III*, the District Court agreed with the Pennsylvania Supreme Court that the *Batson* claim had been defaulted. As discussed below, we find no procedural default.

In its reading of the record, the District Court concluded that Holloway committed a procedural default because it believed that the Pennsylvania Supreme Court refused on the PCRA appeal to reach the merits of the *Batson* claim due to a waiver caused by counsel's failure to raise the *Batson* claim on direct appeal. The record is clear, however, that the Pennsylvania Supreme Court did not fault Holloway for counsel's failure to raise the *Batson* claim on direct appeal. Rather, the Court believed (mistakenly) that Holloway had not raised his *Batson* claim at the PCRA trial level, and held that, for that reason alone, the *Batson* argument was waived from appellate review on the merits. See *Holloway II*, 739 A.2d at 1044. Relying upon its decision in *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998) which held that a PCRA petitioner's waiver at the trial level would only be excused upon a demonstration of ineffectiveness of counsel in waiving the issue, the Court addressed Holloway's *Batson* claim solely as an assertion of counsel's ineffectiveness in waiving the claim. *Holloway II*, 739 A.2d at 1044-46.

Given this record, the District Court erred in concluding that Holloway committed a procedural default due to counsel's failure to raise the *Batson* claim on direct appeal. The Pennsylvania Supreme Court never expressly or otherwise held the claim defaulted for that reason in *Holloway II*. A federal habeas court is "not bound to enforce a state procedural rule when the state itself has not done so, even if the procedural rule is theoretically applicable to [the] facts." *Smith v. Freeman*, 892 F.2d 331, 337 (3d Cir. 1989); *see also*

Harris v. Reed, 489 U.S. 255, 263 (1989) ("[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.") (citations and quotation marks omitted). For these reasons, we hold that the *Batson* claim was not defaulted.

2. Exhaustion

We must next determine whether Holloway exhausted state-court remedies on his *Batson* claim, which Holloway claims to have done on direct appeal. The District Court rejected that contention and the Commonwealth urges affirmance on that ground. The Commonwealth argues that the exhaustion requirement was not met because Holloway raised the *Batson* argument to the Pennsylvania Supreme Court on direct appeal solely in a pro se supplemental brief, and not in his counseled appellate brief. We conclude that Holloway satisfied the exhaustion requirement on direct appeal.

A federal court will not grant a state prisoner's petition for a writ of habeas corpus unless available state-court remedies on the federal constitutional claim have been exhausted. 28 U.S.C. § 2254(b)(1); *Stevens v. Del. Corr. Ctr.*, 295 F.3d 361, 369 (3d Cir. 2002). The exhaustion requirement is satisfied only if the petitioner can show that he fairly presented the federal claim at each level of the established state-court system for review. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999); *Whitney*, 280 F.3d at 250.[2] "Fair presentation" of a claim means that the petitioner

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[2] The established system for review in Pennsylvania capital

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"must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) (citations omitted).

After the denial of his post-verdict motion for a new trial, Holloway was appointed new counsel for his direct appeal as of right. Counsel did not brief a *Batson* issue to the Pennsylvania Supreme Court, although trial counsel had preserved that issue by moving for a mistrial based on the prosecutor's pattern of striking potential African-American jurors. Holloway himself, however, raised a *Batson* claim in a pro se appellate brief that he filed several months after the counseled brief was filed. He also filed an application for permission to file the pro se brief as a supplement to the counseled brief. Holloway argued the legal and factual substance of a claim of purposeful discrimination, cited the Equal Protection Clause as well as *Batson* and other relevant case law, and claimed that the trial court erred in failing to grant his motion for a mistrial based on the prosecutor's pattern of strikes and the failure to offer race-neutral explanations. App. Vol. III at 442. Holloway objected in particular to the strikes of venirepersons Robert Keel and John Hackley, Sr. (discussed *infra*), and claimed that "the prosecutor used his peremptory challenges to strike African-American people from sitting on the jury." *Id.* at 442-43.

The Pennsylvania Supreme Court entered an order deferring consideration of Holloway's application to file the

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cases is an appeal from the trial level directly to the Pennsylvania Supreme Court; this system applies both on direct review following conviction and sentencing, *see* 42 Pa. Cons. Stat. §§ 722(4), 9711(h)(1), and in PCRA proceedings, *see id.* at § 9546(d).

pro se supplemental brief until the time of oral argument on the appeal. App. Vol. III at 450. In its opinion in *Holloway I*, however, the court made no mention of the pro se brief or the *Batson* claim, and issued no order or decision on whether it had accepted or rejected the pro se brief for consideration.

The District Court held a limited evidentiary hearing to determine whether Holloway could show "cause" to overcome what the District Court perceived to be a procedural default caused by counsel's failure to raise the *Batson* claim on direct appeal.[3] The lone witness at the federal hearing was Holloway's counsel on direct appeal, who testified that although he could recall no discussion on the *Batson* claim at oral argument, the Pennsylvania Supreme Court indicated that it would take all issues presented under advisement, including those presented in the pro se supplemental brief. *See* App. Vol. IV at 625-26 ("[T]he Court said it would consider all the matters contained in the pleadings set forth and the *Batson* issue was one of them."); *id.* at 626

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[3] A federal court may not consider the merits of a procedurally defaulted claim unless the petitioner establishes "cause and prejudice" or a "fundamental miscarriage of justice" to excuse the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To show "cause," the petitioner "must demonstrate some objective factor external to the defense that prevented compliance with the state's procedural requirements." *Id.* at 753; *see also Cristin v. Brennan*, 281 F.3d 404, 420 (3d Cir.), *cert. denied*, 123 S. Ct. 195 (2002).

Holloway committed no procedural default on direct appeal, as discussed below, as he exhausted the *Batson* claim by way of his pro se brief. Thus, even if he violated a state procedural rule in the PCRA proceedings (which he did not), the substance of his *Batson* claim can be reviewed on the merits by virtue of the direct appeal exhaustion.

("[T]he Court even noted the fact that it would consider the *Batson* issue or at least his pro se brief."); *id.* at 642 ("[T]he Court had duly noted that it had received the pro se brief, was taking it under advisement, taking all the matters raised under advisement after oral argument."). The Commonwealth, for its part, presented no evidence at the federal hearing to rebut or cast any doubt upon counsel's recollection that the state court accepted the pro se supplemental brief for consideration. On this record, Holloway has met his burden of showing that he exhausted the *Batson* claim on direct appeal, as he placed the state court on notice of the factual and legal substance of his federal equal protection argument and raised the claim through the established system for review. *Cf. Buehl v. Vaughn*, 166 F.3d 163, 176 n.8 (3d Cir. 1999) (noting in a capital case that counseled petitioner exhausted claims by presenting them in a pro se brief to the Pennsylvania Supreme Court).

The Commonwealth argues that we cannot rely on the testimony of Holloway's direct appeal counsel because the District Court lacked authority under 28 U.S.C. § 2254(e)(2) to hold an evidentiary hearing.[4] Appellees Br. at 55-57. This

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[4] Section 2254(e)(2) provides as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
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> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

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Court has held, however, that it is within a District Court's authority to grant a hearing on a petitioner's ability to establish cause to excuse a procedural default, and therefore "§ 2254(e)(2) is inapplicable to those hearings." *Cristin v. Brennan*, 281 F.3d 404, 412-13 (3d Cir.), *cert. denied*, 537 U.S. 897, 123 S. Ct. 195 (2002). Appellate counsel's testimony regarding the direct appeal proceedings fell within the scope of the evidentiary hearing, which was conducted to determine whether there was any "objective factor external to the defense" that prevented counsel from pressing the *Batson* claim in the counseled direct appeal brief. Thus, the evidence adduced at the hearing is properly considered for purposes of the exhaustion analysis.

Our conclusion that Holloway exhausted the *Batson* claim by means of his pro se brief is fully supported by the Pennsylvania Supreme Court's practice, at the time of Holloway's appeal, of considering issues raised pro se even if counseled briefs were filed. In a capital case decided while Holloway's direct appeal was pending, *Commonwealth v. Billa*, 555 A.2d 835 (Pa. 1989), the Pennsylvania Supreme Court noted that appellate counsel neglected to raise an issue concerning the trial court's failure to render an appropriate jury instruction. The appellant himself, however, raised a challenge on that basis in a pro se supplemental brief. *Id.* at 842. The Pennsylvania Supreme Court granted permission to

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> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

file the pro se brief as a supplement to the counseled brief and further granted relief on the merits of the claim. *Id.* In several subsequent capital cases, the Pennsylvania Supreme Court again considered the merits of pro se claims raised by a counseled appellant. *See, e.g., Commonwealth v. Williams*, 615 A.2d 716, 720 n.6 (Pa. 1992); *Commonwealth v. Zook*, 615 A.2d 1, 22 (Pa. 1992); *Commonwealth v. Chambers*, 599 A.2d 630, 633 (Pa. 1991); *Commonwealth v. Tilley*, 595 A.2d 575, 579 n.9 (Pa. 1991).

The Pennsylvania Supreme Court first indicated that it might change course with regard to accepting pro se supplemental briefs in *Commonwealth v. Ellis*, 626 A.2d 1137 (Pa. 1993). In *Ellis*, a non-capital case, the Court affirmed the intermediate Superior Court's practice of refusing to entertain pro se briefs if the appellant is represented by counsel. The Superior Court had held that it "will accept for filing pro se appellate briefs, but [ ] will not review a pro se brief if a counseled brief has been filed, either before, simultaneously with, or after the pro se, due to the judicial confusion and delay that ensues." *Commonwealth v. Ellis*, 581 A.2d 595, 600 (Pa. Super. Ct. 1990). The Pennsylvania Supreme Court approved this practice. It explained that criminal appellants possess no constitutional right to hybrid representation and, therefore, a refusal to consider pro se briefs from counseled litigants is warranted so as not to "confuse and overburden the court." 626 A.2d at 1140; *see also Commonwealth v. Rogers*, 645 A.2d 223, 224 (Pa. 1994) (explaining that "*Ellis* specifically condemns the practice of filing separate pro se briefs" and holding that an appellant cannot terminate counsel after the filing of a counseled brief "simply because he wishes to file pro se appellate briefs"). The Pennsylvania Supreme Court then applied the *Ellis* principle in a direct capital appeal, *Commonwealth v. Reid*, 642 A.2d 453 (Pa. 1994), where the appellant filed a pro se

supplemental brief raising four claims of error after the counseled brief had been filed. Citing its reasoning in *Ellis*, the Court rejected the supplemental brief, holding that "Appellant's pro se claims are improper and will not be considered by this Court." *Id.* at 462.

Ellis and *Reid* marked a retreat from the consideration of pro se claims in counseled cases. Prior case law indicates, however, that the Pennsylvania Supreme Court generally entertained the merits of supplemental pro se claims. The Commonwealth disagrees and argues that "the *Ellis* rule is well-known in Pennsylvania, and has been for a very long time." Appellee/Cross-Appellant's Br. at 61. In support of this assertion, the Commonwealth relies upon various decisions of the intermediate Superior Court from 1985 and earlier, indicating that pro se supplemental briefs had long been disfavored in the Superior Court. *Id.* The present case, however, is a capital proceeding, which entails an appeal taken directly to the Pennsylvania Supreme Court. It is thus irrelevant to our inquiry whether the intermediate Superior Court had a practice of rejecting pro se supplemental briefs in non-capital cases prior to the time of Holloway's appeal. As noted, Pennsylvania Supreme Court decisions around the time of Holloway's direct appeal are fully consistent with the record here that the Court assented to consideration of the pro se supplemental claims, including the *Batson* issue. We simply have no reason to believe that the Court refused to consider Holloway's pro se brief, particularly since such a refusal would have been contrary to its practice at the time.

The District Court rejected Holloway's argument of exhaustion on direct appeal primarily because it faulted Holloway for failing to raise his exhaustion argument during the PCRA proceedings. *Holloway III*, 161 F. Supp. 2d at 502 n.38. It is well-settled that "once [a] federal claim has been

fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard v. Connor*, 404 U.S. 270, 275 (1971). As discussed, "fair presentation" requires raising the federal claim itself; a petitioner has no separate obligation to present a federal exhaustion argument to the state courts for review. Moreover, if a claim is exhausted on direct review but the state court fails to adjudicate the claim, the petitioner need not reassert the claim in a state post-conviction proceeding. Thus, Holloway's decision to reassert the *Batson* claim on PCRA review does nothing to diminish his exhaustion of the claim on direct appeal.

Even if the Pennsylvania Supreme Court were to have held on the PCRA appeal that Holloway's claim was previously litigated by virtue of the pro se direct appeal brief and therefore barred from state collateral review, such a finding would not have prevented a federal court from reaching the merits. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991); *Lambert v. Blackwell*, 134 F.3d 506, 519-20 (3d Cir. 1997). It is "too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam); *see also McMahon v. Fulcomer*, 821 F.2d 934, 941 (3d Cir. 1987); *Swanger v. Zimmerman*, 750 F.2d 291, 295-96 (3d Cir. 1984). Thus, the Pennsylvania Supreme Court's failure to rule on the merits of Holloway's *Batson* claim on direct appeal can have no bearing on our exhaustion analysis. Consequently, we must reject the District Court's conclusion that Holloway "defaulted" his exhaustion argument by failing to raise that argument on PCRA review.

Holloway fairly presented and exhausted his *Batson* claim on direct appeal. "A petitioner who has raised an issue on direct appeal . . . is not required to raise it again in a state post-conviction proceeding." *Lambert*, 134 F.3d at 513; *see also Peoples v. Fulcomer*, 882 F.2d 828, 829 n.1 (3d Cir. 1989). Because Holloway's direct appeal exhaustion is sufficient in itself to bring the *Batson* claim before a federal habeas court for review, we turn to the merits of his claim.[5]

3. Scope of review

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner's habeas petition must be denied as to any claim that was "adjudicated on the merits in State court proceedings" unless the adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2). We have interpreted § 2254(d)'s "adjudication on the merits" language to mean that "when, although properly preserved by the defendant, the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA . . . do not apply." *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001); *see also Everett v. Beard*, 290 F.3d 500, 507-08 (3d Cir. 2002) ("The AEDPA standard of review does not apply unless it is clear from the face of the state

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[5] We note, in any event, that Holloway also exhausted the *Batson* claim on PCRA review, as he presented the claim in his Amended PCRA Petition and again on appeal to the Pennsylvania Supreme Court. Furthermore, as explained above, Holloway committed no default of the claim on PCRA review.

court decision that the merits of the petitioner's constitutional claims were examined in light of federal law as established by the Supreme Court of the United States."). Holloway presented his *Batson* claim to the Pennsylvania Supreme Court on direct appeal, but the Court failed to even mention the claim (much less adjudicate the merits) in its disposition. *Cf. Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000) (claim was not "adjudicated on the merits" because Delaware Supreme Court failed to address it "even though it had the opportunity to do so"). Consequently, pre-AEDPA standards govern.

Additionally, pre-AEDPA standards govern our review even if we limit our analysis to the state court's ruling in the PCRA proceeding. The Pennsylvania Supreme Court treated Holloway's *Batson* argument on PCRA review solely as a claim of ineffective assistance of counsel because it believed that Holloway raised the *Batson* claim for the first time on the PCRA appeal. The record reflects, however, that Holloway in fact raised his *Batson* claim in the PCRA trial court. The Pennsylvania Supreme Court denied relief on the *Batson* claim for the following reasons:

> [Holloway] claims that the Commonwealth used its peremptory strikes in a racially discriminatory manner in violation of [*Batson*]. However, [Holloway] has failed to make a record "identifying the race of veni-repersons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the final jury selected." *Commonwealth v. Bronshtein*, 547 Pa. 460, 691 A.2d 907, *cert. denied*, 522 U.S. 936 (1997). "Where an appellant fails to make a record for review of a *Batson* challenge, this Court is unable to consider a claim that the trial court

> failed to find a prima facie case under *Batson*." *Commonwealth v. Spence*, 534 Pa. 233, 627 A.2d 1176 (1993). Therefore, *it is impossible to determine if [Holloway]'s claim has arguable merit*. Moreover, [Holloway] does not even allege that counsel's ineffectiveness with respect to this issue "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). Accordingly, no relief is due.

Holloway II, 739 A.2d at 1045-46 (emphasis added).

Given that the state court found it "impossible to determine" whether Holloway's underlying *Batson* claim "has arguable merit," it plainly did not render an "adjudication on the merits" of that claim for purposes of applying the AEDPA standards. Accordingly, our review is under pre-AEDPA law with regard to the PCRA decision, as well.[6]

Batson claims present mixed questions of law and fact. *Riley v. Taylor*, 277 F.3d 261, 277 (3d Cir. 2001) (en banc). Under pre-AEDPA standards, the legal conclusions of state courts are reviewed de novo. *McCandless*, 172 F.3d at 260. We must presume that the state court's factual findings are correct unless, *inter alia*, they are not " 'fairly supported by the record.' " *Pemberthy v. Beyer*, 19 F.3d 857, 864 (3d Cir. 1994) (quoting 28 U.S.C. § 2254(d)(8)). "[T]he question in a federal habeas proceeding is not whether the federal courts agree with the state court's factual finding, but

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[6] As explained below, our result would be the same on the *Batson* issue even if we reviewed the claim under the deferential AEDPA standards.

whether that finding is fairly supported by the record." *Meyers v. Gillis*, 93 F.3d 1147, 1149 (3d Cir. 1996).

4. The *Batson* standard[7]

The Supreme Court reaffirmed in *Batson* the long-standing principle that the Fourteenth Amendment's Equal Protection Clause prohibits a prosecutor from using a peremptory challenge to strike a prospective juror solely on account of race. 476 U.S. at 88. As the Court explained, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87.

Batson's primary significance lay in the Court's repudiation of the evidentiary burden that it had previously placed on defendants in making an equal protection claim. In *Swain v. Alabama*, 380 U.S. 202 (1965), the Court had held that a defendant could make a prima facie case of purposeful discrimination only by showing that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.* at 223. *Batson* rejected the *Swain* standard in favor of a three-part burden-shifting

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[7] The Supreme Court issued *Batson* on April 30, 1986, approximately two weeks before jury selection commenced at Holloway's trial. Holloway, therefore, was plainly entitled to the benefit of the *Batson* decision.

process by which a trial court can evaluate an objection to race-based juror exclusion in light of events as they occur in the case before it. The Court explained the process as follows:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328-29 (2003) (citations to *Batson* omitted).

Under *Batson*, although "a defendant has no right to a petit jury composed in whole or in part of persons of his own race . . . the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 85-86 (internal quotations, citations, and footnote omitted). Consistent with this principle, courts have recognized that a prosecutor's purposeful discrimination in excluding even a single juror on account of race cannot be tolerated as consistent with the guarantee of equal protection under the law. *See Harrison v. Ryan*, 909 F.2d 84, 88 (3d Cir. 1990) (holding that relief must be granted under *Batson* "when even one black person is excluded for racially motivated reasons"); *see also United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (recognizing that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose"); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987) ("[W]e emphasize that under *Batson*, the striking of a single

black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors."). Moreover, a prosecutor who intentionally discriminates against a prospective juror on the basis of race can find no refuge in having accepted others venirepersons of that race for the jury. *See Lancaster v. Adams*, 324 F.3d 423, 434 (6th Cir. 2003) ("Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*."), *cert. denied*, 124 S. Ct. 535 (2003).

5. Holloway's *Batson* challenge and the prosecutor's explanations

Holloway first objected to the prosecutor's peremptory strikes on the second day of the voir dire proceedings, after the prosecutor struck Brenda Forrest, an African-American female. Holloway's counsel noted, "I believe the District Attorney has now used all his challenges on black jurors. I believe he has developed a pattern of striking them." App. Vol VII at 1355. The trial court deferred a discussion of the issue because another prospective juror was entering the courtroom, and jury selection continued. After several additional potential jurors were struck by agreement or for cause, Holloway's counsel formally asserted his objection, stating, "I think the District Attorney has now developed a pattern of striking only black prospective jurors. I think that pattern has now developed, and there are nine jurors selected, and two black jurors out of that particular nine. And I would ask for a mistrial and [to] start all over again." App. Vol. VII at 1367-68.

Without indicating whether it thought Holloway established a prima facie case, the trial court invited a response from the prosecutor, asking, "Does the Commonwealth have anything to say at this time?" *Id.* at 1368. The prosecutor replied, "Sure, Judge. As [defense counsel] has indicated, number one, we have nine seated in the box, two of them [sic] whom are black. One black male and one black female. [Counsel] is incorrect when he tells the Court that I have used my pre-empts exclusively on blacks, that's not true. I've struck a white woman also." *Id.* The trial judge then observed that Holloway too had used a peremptory strike against a black female the previous day.[8] After a brief discussion with Holloway as to the reasons why he excluded that potential black juror, *id.* at 1368-69, the trial court ended the matter without expressly ruling on whether the prosecutor had struck African-Americans because of their race. The judge concluded, "[Holloway] also knocked off a potential black juror, but the record will speak for itself." *Id.* at 1369. At that point in the proceedings, the record was clear that the prosecutor had used seven of eight peremptory strikes against African-Americans.

The prosecutor subsequently exercised four additional peremptory strikes, all against African-Americans. After the first of those strikes, against Starlett Sandoval, Holloway's counsel noted for the record that "the Commonwealth has struck another black juror." *Id.* at 1376. The prosecutor

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[8] In *Batson*, the Supreme Court expressed no view on whether the Constitution imposed any limitation upon a criminal defendant's exercise of peremptory challenges. 476 U.S. at 89 n.12. Several years after *Batson*, the Court held in *Georgia v. McCollum*, 505 U.S. 42, 56 (1992), that prosecutors may assert such a *Batson* challenge.

offered no explanation for the strike, nor did the court request one. The prosecutor later struck Robert Keel, after which defense counsel noted, "Let the record indicate a black male." *Id.* at 1397. Without prompting from the trial court, the prosecutor elected to explain the strike, stating, "May the record indicate a single, young, unemployed, on welfare, black male." *Id.* The prosecutor next used a peremptory strike against John Hackley, Sr., and Holloway again noted the venireperson's race. App. Vol. VIII at 1488. The prosecutor explained, "Let the record further show that it is a black juror, black male juror approximately the same age as the defendant." *Id.* Finally, the prosecutor exercised a peremptory strike against Elouise Baldi, and after Holloway made note of her race, the prosecutor explained that she was "a Black female, whose brother-in-law was convicted of narcotics charges. Narcotics would play a central role in the testimony of this case." *Id.* at 1493-94.

The matter proceeded to trial with a jury of nine white jurors and three black jurors, with two white alternate jurors.[9] Holloway renewed his *Batson* challenge, albeit in a cursory fashion, in a post-verdict motion for a new trial.[10] The trial

[9] There was some confusion in the state court proceedings as to the racial composition of the jury, with Holloway arguing in the PCRA proceeding that the jury consisted of ten white jurors and two black jurors. It became clear in this federal habeas proceeding that the final composition was actually nine white jurors and three black jurors. This discrepancy in the final numbers, however, is not material to our analysis under *Batson*.

[10] Holloway's trial counsel, Barry Denker, Esq., filed the motion for a new trial but was unable to argue the motion or to file a brief in support. Holloway was represented at a hearing on the motion by an associate of Denker's who had not entered an

(Continued)

court summarily rejected the post-trial *Batson* argument as "unspecific."

6. Merits Analysis

A.

We have little difficulty in concluding that Holloway met his burden under the first step of the *Batson* analysis. A court should consider "all relevant circumstances" in assessing whether a prima facie showing of discrimination has been made. *Batson*, 476 U.S. at 96. This Court has identified five factors that are generally relevant in this inquiry: "1) the number of racial group members in the panel; 2) the nature of the crime; 3) the race of the defendant; 4) a pattern of strikes against racial group members; and 5) the questions and statements during the voir dire." *United States v. Clemons*, 843 F.2d 741, 748 (3d Cir. 1988).

The most striking factor in this case is the prosecutor's pattern of strikes. Holloway moved for a mistrial after the prosecutor had used seven of eight peremptory strikes against African-Americans; the Commonwealth ultimately used eleven of twelve strikes in that manner. As the Court explained in *Batson*, "a 'pattern' of strikes against black jurors in the particular venire might give rise to an inference of discrimination." 476 U.S. at 97. The pattern here was certainly strong enough to suggest an intention of keeping blacks off the jury. *Cf. Harrison*, 909 F.2d at 87 (finding prima facie case where prosecutor used six of eight

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(Continued)

appearance at trial. Denker had become unavailable to Holloway shortly after trial because he entered the Federal Witness Protection Program following his federal convictions for bribing Philadelphia judges and court officials.

peremptory challenges against African-Americans); *see also Clemons*, 843 F.2d at 747 (recognizing that "[s]triking a single black juror could constitute a prima facie case even when blacks ultimately sit on the panel and even when valid reasons exist for striking other blacks").

In addition, for purposes of a prima facie showing, Holloway is entitled "to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). In responding to Holloway's motion for a mistrial, the prosecutor agreed as to the racial composition of the nine jurors seated to that point (seven whites, two blacks), and explained that he had not used his "pre-empts exclusively on blacks" because he had "struck a white woman also." App. Vol. VII at 1368. This explanation, however, did nothing to dispel Holloway's suggestion that the prosecutor harbored a discriminatory intent in striking the seven prospective black jurors. A prosecutor cannot undermine a pattern of strikes that appears racially motivated by merely pointing to a lone juror of a different race whom he also found objectionable. A prosecutor also cannot "rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections." *Batson*, 476 U.S. at 98 (internal quotation marks and citation omitted). A further relevant circumstance here is that while Holloway, the victim, and key prosecution witness Shirley Baker were all black, the officer who took Holloway's custodial statement, Detective Gilbert, was white. Given that Holloway's defense would rise or fall largely on his claim that the custodial statement was fabricated, Holloway's credibility versus that

of Detective Gilbert, a white police officer, was a crucial issue for the jury.[11]

In short, there was "sufficient reason to believe that discrimination may have been at work here to require the state to come forward with an explanation of its actions." *Johnson*, 40 F.3d at 666. The trial court, as noted, did ask the prosecutor for an explanation following Holloway's motion for a mistrial, but we cannot infer from the court's question — "Does the Commonwealth have anything to say at this time?" — that it found a prima facie case. The court's query suggests that the Commonwealth was under no obligation to provide any response at all, thereby indicating that the second stage of the *Batson* inquiry had not been reached. If

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[11] We note that Holloway did not establish the number of blacks in the venire during the course of the state court proceedings. The parties were able to ascertain the composition in this habeas proceeding, largely by relying on the prosecutor's voir dire notes once they were turned over to Holloway as part of the limited discovery conducted before the District Court. Eighty-seven potential jurors were questioned during the voir dire, forty-two of whom were struck for cause. Of the remaining forty-five potential jurors, the defense struck nine before the prosecutor had an opportunity to use a peremptory challenge. The parties agree that of the thirty-six venirepersons the prosecutor had an opportunity to strike, fourteen were black and twenty-two were white. The prosecutor, as noted, used eleven strikes against blacks. Thus, the prosecutor struck eleven of the fourteen blacks he had an opportunity to strike.

Although this evidence further supports Holloway's prima facie showing, it is by no means necessary to establish a prima facie showing under *Batson* given the other evidence of record. Moreover, because Holloway failed to develop this information in state court, we do not consider it here.

anything, we can assume the trial court found no prima facie case because it allowed the matter to proceed without explanation from the Commonwealth as to the basis for the individual strikes. Insofar as the trial court found no evidence sufficient to support a prima facie showing of discrimination, we must reject that unexplained determination as inconsistent with *Batson* and not fairly supported by the record.

Significantly, we have recognized that the question of whether a prima facie case has been established becomes moot, and thus need not even be addressed, when the prosecutor provides explanations for the strikes despite the absence of a request from the trial court. *See Johnson*, 40 F.3d at 663-65. We have explained that,

> independent of the strength of the evidence tendered as a prima facie case, once a prosecutor attempts to explain a peremptory challenge, we believe the trial and reviewing courts should look to the entire record to determine if intentional discrimination is present. If the prosecutor's explanation raises more concern than it puts to rest, courts cannot effectively close their eyes to that fact by simply deciding that the defendant has not made out a prima facie case.

Clemmons, 892 F.2d at 1156; *see also Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."). Thus, based on the prosecutor's explanations alone, the trial court should have reached the second and third steps in the *Batson* inquiry in this case.

The second *Batson* step requires that the prosecutor provide a "neutral, nonpretextual explanation for striking the black venirepersons from the venire panel." *Jones*, 987 F.2d at 973. After the motion for a mistrial was rejected, Holloway duly noted each peremptory challenge exercised against an African-American, and the prosecutor elected to make a record of his reasons for three of those four strikes. Although we are troubled by the lack of race-neutrality in each of the prosecutor's explanations, and perhaps more troubled by the lack of any explanation at all for eight of his eleven strikes, the explanation given as to venireperson John Hackley, Sr., was plainly insupportable under *Batson* and warrants relief.

The prosecutor explained the Hackley strike on the ground that Hackley "is a black juror, black male juror approximately the same age as the defendant." In other words, the prosecutor cited Hackley's race, age, and gender as the reasons for the strike. Race, obviously, was impermissible, but we will assume that the prosecutor referred to Hackley's race merely as a concession that Hackley was black so that his race would be clear as a matter of record. Thus, we focus on the prosecutor's stated reasons of age and gender.[12] This Court has firmly established that "[a] comparison between a stricken black juror and a sitting white juror is relevant to determining whether the prosecution's asserted justification for striking the black juror is

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[12] In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Supreme Court extended *Batson* to prohibit discrimination on the basis of gender. Holloway's objection to the exclusions here, however, centered solely on race, and thus we limit our analysis accordingly. We note, nevertheless, the Court's observation in *J.E.B.* that "[b]ecause gender and race are overlapping categories, gender can be used as a pretext for racial discrimination." *Id.* at 145.

pretextual." *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001) (en banc). Hackley was born in 1950 and thus was nine years younger than Holloway, who was born in 1941. Using this nine-year measure for age proximity, the record shows the prosecutor accepted three white jurors "approximately the same age" as Holloway, two of whom were males — Joseph Zingone (born 1935), Patricia Connor (1948), and John Jackubiak (1943). In addition, he chose not to exercise a peremptory strike against four other white jurors (one male) of approximately the same age who ultimately did not serve on the jury — Thomas St. Joseph (1941), Blanche Cohen (1933), Kathleen Fallon (1940), and Dolores Kovack (1937). "The presence of white jurors who possessed the same characteristic indicates that this explanation was pretextual." *Jones*, 987 F.2d at 973. We find nothing in the prosecutor's explanation of the Hackley strike, or in the record as a whole, to indicate that he harbored anything but a discriminatory intent to remove Hackley because of his race.

The Commonwealth defends the Hackley strike by looking to the voir dire transcript for information that might have motivated the prosecutor's decision beyond the reasons stated on the record. In particular, the Commonwealth notes that Hackley indicated that he lived in the neighborhood where the murder took place and knew "some people around that neighborhood . . . but not by the names." App. Vol. VIII at 1485. The Commonwealth suggests that "[t]he prosecutor could well have been concerned that Mr. Hackley's similarity in age and his connections to the neighborhood could translate into familiarity with 'some of the people' involved in the case." Appellee/Cross-Appellant's Br. at 73. This speculation, however, does not aid our inquiry into the reasons the prosecutor actually harbored for the Hackley strike. *Batson* is concerned with uncovering purposeful discrimination, and where a prosecutor makes his explanation for a strike a

matter of record, our review is focused solely upon the reasons given. As we noted in *Riley*, "[a]pparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge." 277 F.3d at 282. Thus, the Commonwealth's attempt to recast the prosecutor's stated reasons must be rejected.

In any event, Hackley's statements during voir dire give no indication of an independent basis for the prosecutor's action. Although Hackley lived in the neighborhood where the murder took place, the prosecutor explored that fact with a single question seeking an assurance that Hackley's residence would not influence his consideration of the case. App. Vol. VII at 1485. Hackley stated that he was "sure" it would have no influence. *Id.* Hackley was also unequivocal in stating that he could impose the death penalty if warranted. He noted that he was married with two teenage children and held steady employment, and he stated that he could be fair to both sides in hearing the case. The prosecutor, nevertheless, exercised the peremptory strike after defense counsel indicated that he had no questions for Hackley. On this record, we could not impute a proper motive to the prosecutor's action even if it were proper to hypothesize potential reasons for the strike beyond those given. Relief, therefore, must be granted.

We are not unmindful that the state trial court failed to acknowledge or expressly follow the three-step *Batson* analysis in this case. In particular, the court never formally asked the prosecutor to provide a full explanation for the strikes. Ordinarily, an evidentiary hearing at which the prosecutor might rely upon his recollection of the voir dire and make reference to his trial notes would seem warranted. Here, however, the parties agree that the prosecutor is "psychiatrically disabled" and has been for some time, and thus

would be unable to testify meaningfully at a hearing. Holloway's trial counsel is deceased (as noted, he became unavailable shortly after the trial), as is the presiding trial judge. It seems unlikely at this stage — some seventeen years after the trial — that the prosecutor, even were he not "disabled," could accurately recall his reasons for the strikes or provide meaningful elaboration upon the reasons that he placed on the voir dire record. Furthermore, given the unavailability of the relevant participants, there would be no benefit to a hearing at this point. *See Riley*, 277 F.3d at 293-94. The long delay in reaching this stage is certainly regrettable, both for the Commonwealth and for Holloway, but we cannot fault Holloway, who has pursued the *Batson* argument at every stage of this case since the time of trial in 1986.

B.

Although it did not address the *Batson* claim on direct appeal, the Pennsylvania Supreme Court rejected the claim on PCRA appeal because it found that Holloway failed to make a record identifying (1) the race of venirepersons stricken by the Commonwealth, (2) the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and (3) the racial composition of the final jury selected. *Holloway II*, 739 A.2d at 1045 (citing *Commonwealth v. Bronshtein*, 691 A.2d 907 (Pa. 1997)). The Court explained that, "[w]here an appellant fails to make a record for review of a *Batson* challenge, this Court is unable to consider a claim that the trial court failed to find a prima facie case under *Batson*." *Id.* (citing *Commonwealth v. Spence*, 627 A.2d 1176 (Pa. 1993)). We find this analysis inconsistent with the teachings of *Batson*.

The state court's rejection of Holloway's claim for want of evidentiary support was an application of what the

parties here call the "*Spence* rule." In *Commonwealth v. Spence*, the Pennsylvania Supreme Court affirmed the denial of a capital defendant's *Batson* claim on the ground that he failed to make an adequate record to permit meaningful review of the trial court's failure to find a prima facie case. 672 A.2d at 1183. The Court observed that the defendant had not "specifically identif[ied] the race of all the veniremen who had been removed by the prosecution, the race of all the jurors who served, or the race of jurors acceptable to the Commonwealth who had been stricken by the defense." *Id.* at 1182-83. Applying this rule, the Court noted the defendant's claim that ten of twelve Commonwealth peremptory strikes were used against African-Americans, but it denied relief because the defendant had identified for the record only four, not ten, potential jurors as being black. *Id.*

The evidentiary requirements set forth in *Spence* — that the defendant identify the race of all veniremen removed by the prosecution, the race of all the jurors who served, and the race of jurors acceptable to the Commonwealth but struck by the defense — seem to have developed under Pennsylvania law into a standard for assessing whether a defendant can make a prima facie showing of purposeful discrimination so as to move beyond the first step in the *Batson* analysis. For example, in *Commonwealth v. Bronshtein*, 691 A.2d 907 (Pa. 1997), which was cited to support the rejection of Holloway's *Batson* claim, the Pennsylvania Supreme Court explained the rule as follows: "In order to establish a prima facie case on a *Batson* claim, defendant must make a record identifying the race of venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the final jury selected." *Id.* at 915.

In *Commonwealth v. Simmons*, 662 A.2d 621, 631 (Pa. 1995), the Court fully explained the workings of the *Spence* rule and its role in the *Batson* analysis:

> To sustain a prima facie case of improper use of peremptory challenges, a defendant must establish the following: (1) the defendant is a member of a cognizable racial group and the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; (2) the defendant can then rely on the fact that the use of peremptory challenges permits those to discriminate who are [of] a mind to discriminate; and, (3) the defendant, through facts and circumstances, must raise an inference that the prosecutor excluded members of the venire on account of their race. *Commonwealth v. Dinwiddie*, 601 A.2d 1216, 1218 (1992). This third prong requires defendant to make a record specifically identifying the race of all the venirepersons removed by the prosecution, the race of the jurors who served and the race of jurors acceptable to the Commonwealth who were stricken by the defense. After such a record is established, the trial court must consider the totality of the circumstances to determine whether challenges were used to exclude venirepersons on account of their race. If the trial court finds in the affirmative, it may then require the prosecutor to explain his or her reasons for the challenge.

Id. at 631. Thus, as *Simmons* and subsequent cases make clear, to raise an inference of discrimination in support of a prima facie *Batson* showing, a Pennsylvania defendant must first make a record under the *Spence* rule. *See Commonwealth v. Marshall*, 810 A.2d 1211, 1216 (Pa. 2002); *Commonwealth v. Baez*, 720 A.2d 711, 736 (Pa. 1998);

Commonwealth v. Gibson, 688 A.2d 1152, 1159 (Pa. 1997); *Commonwealth v. Jones*, 668 A.2d 491, 518 (Pa. 1995); *Commonwealth v. Johnson*, 668 A.2d 97, 102 (Pa. 1995); *Commonwealth v. Hill*, 727 A.2d 578, 582 (Pa. Super. Ct. 1999).[13]

In *Batson*, the Supreme Court discussed the requirements for a prima facie case in the following terms:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the

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[13] In some recent cases, usually those involving claims of improper exclusions based on gender, the Pennsylvania Supreme Court has expanded the three *Spence* categories to require two additional showings in order to state a prima facie case—the race (or gender) of all venirepersons remaining after challenges for cause, and the race (or gender) of all the venirepersons in the jury pools. *See, e.g.*, *Commonwealth v. Rico*, 711 A.2d 990, 993 (Pa. 1998); *Jones*, 668 A.2d at 518. In other recent cases, however, the Court has invoked only the original three categories. *See, e.g.*, *Marshall*, 810 A.2d at 1216; *Commonwealth v. Hackett*, 735 A.2d 688, 694 (Pa. 1999).

> selection of the venire, raises the necessary inference of purposeful discrimination.
>
> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Batson, 476 U.S. at 96-97.

The *Batson* standard for assessing a prima facie showing is fluid, mainly because it places great confidence in the ability of trial judges to assess whether discrimination is at work based on the evidence at hand. The judge's assessment "largely will turn on evaluation of credibility," *id.* at 98 n.21, and "[t]he analysis set forth in *Batson* permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *Hernandez v. New York*, 500 U.S. 352, 358 (1991). The defendant's burden at the initial stage is to show merely that jurors of his race have been struck and that the strikes are indicative of an improper motive. The defendant generally meets this burden if there is a pattern of strikes or if the prosecutor's questions and statements during voir dire support an inference of

discriminatory purpose. Notably absent from the *Batson* discussion of the prima facie case is any call for trial judges to seek the type of statistical accounting required by the *Spence* rule — nor do we see how such an accounting fits within *Batson's* first step. A trial judge undoubtedly might find in a given case that a full accounting regarding the race of the venire and the jurors struck would be helpful at the third stage of the *Batson* analysis, after it has heard the prosecutor's explanation for the strikes and must "determine if the defendant has established purposeful discrimination." *Id.* at 98. But requiring the presentation of such a record simply to move past the first stage in the *Batson* analysis places an undue burden upon the defendant.

Under the *Batson* process, a defendant must identify the race of the venireperson struck if he wishes to raise a challenge to the strike based on race. If the defendant is claiming a pattern of strikes to support an inference of discrimination, then a record of the race-based strikes that preceded the objection is also required. But a defendant's *Batson* objection need not always be based on a "pattern" of strikes; it can be based, for example, on a single strike accompanied by a showing that the prosecutor's statements and questions to the juror (or to prior jurors) support an inference of discrimination. Requiring a defendant in that circumstance to identify "the race of all the venirepersons removed by the prosecution" is not necessary to support a prima facie case, and places an irrelevant hurdle in the way of reaching the second step in the *Batson* process.

Similarly, and perhaps more troubling, is the requirement that defendants support a prima facie case by identifying "the race of the jurors who served and the race of jurors acceptable to the Commonwealth who were stricken by the defense." *Simmons*, 662 A.2d at 631. As noted,

Batson is premised on the fact that defendants "have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," and the "Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race." *Batson*, 476 U.S. at 85-86. The final composition of the jury (or even the composition of the jury at the time the *Batson* objection is raised) offers no reliable indication of whether the prosecutor intentionally discriminated in excluding a member of the defendant's race. Indeed, the composition of a jury is decided by many factors, including the defendant's use of peremptory challenges, challenges for cause, and jurors' claims of hardship. Thus, "a *Batson* inquiry focuses on whether or not racial discrimination exists in the striking of a black person from the jury, not on the fact that other blacks may remain on the jury panel." *United States v. Johnson*, 873 F.2d 1137, 1139 n.1 (8th Cir. 1989). A defendant can make a prima facie case of discrimination without reference to the jury's racial makeup.

Likewise, evidence of "the race of jurors acceptable to the Commonwealth who were stricken by the defense," *Simmons*, 662 A.2d at 631, finds no place in the prima facie case, as defense strikes are irrelevant to the determination of whether the prosecutor has engaged in discrimination. *Batson* nowhere suggests that a defendant must support his challenge to the prosecutor's actions by showing that he has "clean hands," or by admitting that he too struck black jurors from the jury (which is what the trial court here seemed to ask of Holloway when it raised the fact that Holloway had also struck a black juror from the venire). While *Batson* permits a trial judge to focus at the prima facie stage upon "all *relevant* circumstances," the nature of a defendant's strikes fails the test for relevancy. Instead, the focus properly falls on the prosecutor's actions, looking primarily at whether

there is a pattern of strikes and whether the prosecutor's questions and statements support or refute an inference of discrimination.

In the instant case, the Pennsylvania Supreme Court determined that Holloway's failure to comply with the *Spence* rule rendered the Court "unable to consider a claim that the trial court failed to find a prima facie case under *Batson*." *Holloway II*, 739 A.2d at 1045. As a result, the Court found it "impossible to determine if [Holloway]'s claim has arguable merit." *Id.* Given the record Holloway established on the *Batson* claim during voir dire, we conclude that he stated not only a prima facie case, but also an entitlement to relief under *Batson*'s third step. The voir dire transcript reflects a sufficient "pattern" of strikes at the time of the motion for a mistrial (seven of eight), as well as the prosecutor's evasive statement in response. The record also reflects the prosecutor's inadequate explanations as to three of the four strikes, particularly the Hackley strike, to which Holloway subsequently objected. Thus, there was ample evidence under *Batson*'s first step from which the Pennsylvania Supreme Court could have assessed whether the trial court erred in failing to find a prima facie case. The Court's finding of an insufficient record is not fairly supported and is inconsistent with *Batson*'s mandate.

As a final matter, we note that relief would be warranted even if our analysis were confined by the requirements of AEDPA, as the Pennsylvania Supreme Court's PCRA decision was "contrary to" and an "unreasonable application of" the *Batson* standard. "A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Williams v. Taylor*, 529 U.S. 362, 405

(2000). Application of the *Spence* rule is at odds with *Batson's* first step because it places a burden upon the defendant to make a record of largely irrelevant information in order to raise an inference that the prosecutor excluded members of the venire on account of race. The *Spence* rule runs contrary to federal law insofar as it prevents a court from shifting the burden to the prosecutor upon a defendant's showing, based on the factors required by *Batson*, that discrimination is at work. In that the *Spence* rule provided a justification for refusing to reach the merits of Holloway's prima facie case, the Pennsylvania Supreme Court engaged in an unreasonable application of the clearly established *Batson* standard. Accordingly, we must reject the Pennsylvania Supreme Court's PCRA disposition under AEDPA, as well.

IV. Conclusion

For the reasons stated, the judgment of the District Court entered on August 27, 2001, will be reversed. The matter will be remanded to the District Court with instructions to issue a writ of habeas corpus conditioned upon the Commonwealth's right to conduct a retrial within 120 days from entry of the District Court's order granting the petition.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARNOLD HOLLOWAY,	)	**CIVIL ACTION**
Petitioner,	)	
v.	)	
	)	
MARTIN HORN, Commissioner,	)	**NO. 00-CV-1757**
Pennsylvania Department of Corrections, and DONALD VAUGHN,	)	
Superintendent, State Correctional Institution at Graterford,	)	
Respondents.	)	**CAPITAL CASE**

FILED AUG 27, 2001
ENTERED AUG 27, 2001

OPINION AND ORDER

Van Antwerpen, J. **August 27, 2001**

I. INTRODUCTION

This matter is before us pursuant to a Petition for a Writ of Habeas Corpus, filed by Arnold Holloway ("Petitioner"), a/k/a Nasir Kareem, a/k/a Arnold L. Walker, a/k/a/ Prince Lee Holloway, on April 3, 2000. Petitioner presents sixteen claims and numerous subclaims under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, in pursuit of relief from his state murder conviction and death sentence. Petitioner was arrested on May 30, 1985 and charged with possession of the instrument of a crime, criminal conspiracy and first degree murder arising from the death of Richard Caldwell on May 16, 1980.

Richard H. Knox, Esq. was appointed by the state trial court to assist Petitioner in presenting his defense, but he withdrew upon the entry of appearance by the privately retained Barry Denker, Esq. ("trial counsel"). Petitioner was prosecuted by Assistant District Attorney Drew R. Barth ("the ADA" or "the prosecutor"). Petitioner was found guilty by a jury on all charges in the Court of Common Pleas, Philadelphia County, June Term, 1985, Nos. 1305-1308, Hon. Albert F. Sabo, presiding, on May 22, 1986. The same jury fixed the penalty at death the next day in a bifurcated proceeding. Mr. Denker filed post-verdict motions, but then sought to withdraw as counsel because of Petitioner's dissatisfaction with his performance and his own ill health, but Judge Sabo ordered that his firm continue to represent Petitioner. Thereafter Petitioner was represented at post-verdict proceedings by Mary Zell, Esq., an associate of Mr. Denker's, who refused to argue Mr. Denker's ineffectiveness. In an opinion dated September 21, 1987, Judge Sabo denied relief on all grounds raised in the motion. Petitioner filed a timely appeal to the Pennsylvania Supreme Court. He was represented on direct appeal by Richard R. Redmond, Esq. ("appellate counsel" or "direct appeal counsel"), who filed a brief on his behalf on November 2, 1988. The Pennsylvania Supreme Court denied relief on March 20, 1990. *Commonwealth v. Holloway* ("*Holloway I*"), 572 A.2d 687 (Pa. 1990).

On May 3, 1991 Petitioner filed a pro se petition for collateral post-conviction relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541 et seq. On August 5, 1991, John P. Cotter, Esq. ("PCRA counsel") was appointed to represent Petitioner in his post-conviction proceedings. PCRA counsel filed an Amended Petition and Memorandum of Law on June 21, 1993. Several more counseled and pro se supplemental petitions and memoranda of law were filed. On July 19, 1995, Judge Sabo

ordered that an evidentiary hearing be held in conjunction with Petitioner's claims for state post-conviction relief, and such hearing was held on February 10, 1997. Petitioner's post-conviction claims were denied in the Court of Common Pleas of Philadelphia County, Criminal Appeals/Post Trial Unit, on July 16, 1997. Petitioner then filed a timely appeal to the Pennsylvania Supreme Court, and briefs were filed by new counsel. The appeal was denied on October 1, 1999, and the decision of the Court of Common Pleas, Hon. Albert F. Sabo, was affirmed. *See Commonwealth v. Holloway* ("*Holloway II*"), 739 A.2d 1039 (Pa. 1999).

This case comes before us under § 2254 of the AEDPA, which permits federal courts to grant, under certain circumstances, a writ of habeas corpus to prisoners convicted in state court. Petitioner filed his Petition for a Writ of Habeas Corpus ("Petition" or "Pet.") in this Court on April 3, 2000. His Petition was followed by a Memorandum of Law in Support of Petition for a Writ of Habeas Corpus ("Memorandum of Law" or "Pet. Mem. L.") and a Motion for Discovery on June 22 of that year.[1] We denied the Motion for Discovery on August 9, 2000. The Commonwealth submitted its Response to Petition for Writ of Habeas Corpus ("Comm. Resp.") on February 28, 2001. On March 23, 2001, we ordered that the Clerk of Quarter Sessions Court of Philadelphia County file with the Clerk of this Court all records of Petitioner's state court proceedings, and we received such records on April 20, 2001. Petitioner filed a Reply Memorandum in Support of Petition for a Writ of Habeas

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[1] The Memorandum of Law appears to have been filed on that date, but due to a filing error, it was never docketed. We brought the discrepancy in the docket to the attention of Petitioner's counsel, and a Corrected Memorandum of Law in Support of the Petition was filed on June 24, 2001.

Corpus ("Pet. Reply Mem.") on May 10, 2001. After reviewing the entire record and the filings of the parties, we found that Petitioner had shown good cause for us to exercise our discretion and order limited discovery of evidence supporting the claim of racial discrimination in the selection of Petitioner's jury, which we ordered on July 5, 2001. The parties provided such discovery to each other and the Court by July 24, 2001. Oral arguments thereon were held on August 2, 2001, at which time Petitioner submitted a Motion for Summary Judgment on the *Batson* Claim. On August 6, 2001 we scheduled an evidentiary hearing to be held on August 16, 2001 as to direct appeal counsel's reasons for not raising the *Batson* claim. On August 14, 2001 the Commonwealth filed a Response to Petitioner's Motion for Summary Judgment on the *Batson* Claim and a Motion for Reconsideration of Grant of Evidentiary Hearing. The evidentiary hearing was held on August 16, 2001, at which time we denied the Motion for Reconsideration. Both parties filed post-hearing letter-briefs on August 17, 2001. All papers, oral arguments, evidence from the hearing, and the expanded record have been considered herein, except as specifically noted. We have placed the burden of proof on Petitioner to establish by a preponderance of the evidence any or all of the sixteen claims and numerous subclaims included in his Petition, and find that he has satisfied this burden with respect to one of his subclaims. We therefore vacate Petitioner's death sentence and remand his case to the Pennsylvania courts with an order that there be a resentencing proceeding.

II. FACTUAL BACKGROUND

The Commonwealth's evidence at trial consisted primarily of Petitioner's unsigned statement, the statement and testimony of Shirley "Bones" Baker (Baker), and the testimony of a medical examiner and several police officers.

On May 16, 1980, at approximately 1:45 a.m., police were summoned to the 300 block of West Sedgley Street in Philadelphia, where, lying in the street, was a dead body later identified as Richard Caldwell ("Caldwell" or "the victim").

Baker was arrested in January 1985 on bench warrants arising from her failure to appear for sentencing on several drug charges. While under arrest, she made a statement to the police regarding her knowledge of the murder of Caldwell, implicating Petitioner and others. She testified at Petitioner's trial, and her testimony was consistent in most material aspects with her previous statement.

At trial, Baker described an operation in which she, Petitioner, Danny "Black" Freeman (Freeman), and Caldwell sold heroin for Leroy "Bubbles" Johnson (Johnson). Petitioner obtained heroin from Johnson and then distributed it to Baker, Freeman and Caldwell who sold it on the street. The money was split between the dealers who sold the heroin on the street and Petitioner, who then gave the money to Johnson. In May of 1980, Johnson grew impatient because Caldwell owed him money for drugs he sold. (N.T. 5/19/86 at 70-76, 85.) Petitioner revealed in his statement that Johnson was also angry at Caldwell because Caldwell owed money to a rival drug dealer with whom Johnson wanted to do business, and Caldwell's debt was interfering with his plans. (N.T. 5/19/86 at 164-165.)

Baker testified that around midnight on May 16, 1980 she was selling heroin at a bar at 7th and Allegheny Avenues in North Philadelphia. Johnson arrived and offered Baker some cocaine, so they left the bar and went to Baker's apartment. After snorting the cocaine, Petitioner and Freeman arrived, and Petitioner asked to borrow Johnson's van.

Johnson informed them that Caldwell was in the van, and Petitioner replied, "I can take care of that now." Then, Petitioner and Freeman went upstairs, got a shotgun, and left the apartment. Petitioner and Freeman returned between a half hour and an hour later and whispered with Johnson about shooting and strangling Caldwell. Petitioner, Johnson, and Freeman then left the apartment and Baker returned to the bar. (N.T. 5/19/86 at 79-83; 131.)

Petitioner's unsigned statement to police made after he was arrested in May 1985 presents a similar account with some significant differences. Petitioner stated that he, Johnson, Baker, and Freeman were all snorting cocaine in Petitioner's apartment, while Caldwell was passed out in Johnson's van.[2] Johnson instructed Petitioner to "Go, get on your job." Petitioner protested, wondering if he might simply hurt Caldwell instead of killing him. Johnson replied, "It's either you or him." According to the statement, Johnson had earlier told Petitioner: "When I get him set up take him out and shoot him." After getting the shotgun and leaving the apartment, Petitioner and Freeman tied Caldwell's hands together, and drove several blocks to 3rd and Sedgley Streets. They pushed Caldwell out of the van, strangled him, taking turns pulling at a belt around his neck, and each shot him once in the head. They then drove the van back to Seventh Street, and informed Johnson that the job was done. (N.T. 5/19/86 at 161-162.)

The medical examiner, Dr. Halbert Fillinger, testified that the cause of Caldwell's death was two shotgun blasts to

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[2] Petitioner and Baker both had apartments in the same house. It is not clear from his statement whether he was referring to his apartment or the house as the place that they were snorting cocaine.

the head and strangulation by ligature. He revealed that the shotgun wounds had been inflicted at contact range on the right side of the victim's head, and also testified that a 1.3 cm wide groove extended around the victim's neck, indicating strangulation. (N.T. 5/19/86 at 57-58, 60.)

Petitioner was tried for the first degree murder of Richard Caldwell, criminal conspiracy and possession of the instrument of a crime. He was convicted by a jury and sentenced to death. He has been denied relief from his conviction and sentence both on direct appeal and in state collateral proceedings under the PCRA. He now petitions this court for federal habeas corpus relief pursuant to § 2254 of the AEDPA.

III. DISCUSSION

A. Exhaustion And Procedural Default

Before filing a petition for habeas corpus relief under 28 U.S.C. § 2254, a petitioner must exhaust all available state court remedies. 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is a rule of comity, not jurisdiction, *Castille v. Peoples*, 489 U.S. 346, 349 (1989), and is designed to allow state courts the opportunity to correct a state's alleged violation of federal constitutional law before federal courts consider the matter. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

Exhaustion requires that petitioner fairly present his claims to every level of state court, including offering each

claim for discretionary review by a State's highest court, and afford each reviewing court a fair opportunity to act on those claims.[3] *O'Sullivan*, 526 U.S. at 845; *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). To satisfy the "fair presentation" requirement, the state court pleadings must demonstrate that the legal theory and supporting facts asserted in the federal habeas petition are "substantially equivalent" to those presented to the state courts, *see Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996), and the method of legal analysis to be applied in federal court was available to the state courts, *see McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999).[4]

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[3] This requirement is currently being questioned in Pennsylvania with regard to non-capital cases. *See Mattis v. Vaughn*, 128 F. Supp. 2d 249, 259 (E.D. Pa. 2001) (upholding an order by the Pennsylvania Supreme Court making discretionary review by that court "unavailable" for purposes of federal habeas review). The Pennsylvania Supreme Court, however, exercises mandatory review of all death sentences, thereby making the order addressed in *Mattis* inapplicable here.

[4] The Third Circuit has interpreted this standard and established four criteria to determinewhether a federal claim is fairly presented when state court pleadings do not refer to specific, appropriate portions of the Constitution:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999) (quoting *Evans v. Court of Common Pleas, Del. County, Pa.*, 959 F.2d 1227, 1232 (3d Cir. 1992)).

The petitioner bears the burden of proving that he has exhausted available state remedies. See *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir. 1990); *Santana v. Fenton*, 685 F.2d 71, 73 (3d Cir. 1982). The petitioner is not, however, required to revisit claims raised on direct appeal in state collateral proceedings, *see O'Sullivan*, 526 U.S. at 844 (citing *Brown v. Allen*, 344 U.S. 443, 447 (1953)), or seek alternatives to state habeas such as "a suit for injunction, a writ of prohibition, or mandamus or a declaratory judgment in the state courts." *Id.* (citing *Wilwording v. Swenson*, 404 U.S. 249, 249-50 (1971) (per curiam)). If the petitioner is unable to prove that all claims in his petition satisfy the statutory exhaustion requirements, his entire petition must be dismissed without prejudice and returned to the state courts for consideration of the unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 522 (1982); *Lines v. Larkins*, 208 F.3d 153, 159-60 (3d Cir. 2000). In the clear absence of any colorable federal claim, unexhausted claims may be dismissed on their merits. *See Lambert v. Blackwell*, 134 F.3d 506, 515 (3d Cir. 1997) (interpreting 28 U.S.C. § 2254(b)(2): "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

If, however, state procedural rules bar a petitioner from seeking further relief in state courts, "the exhaustion requirement is satisfied because there is 'an absence of available State corrective process.'" *McCandless v. Vaughn*, 172 F.3d at 260 (citing 28 U.S.C. § 2254(b)); *see also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996) ("Because [the exhaustion] 'requirement . . . refers only to remedies still available at the time of the federal petition,' it is satisfied 'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law.'" (citations omitted)); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) ("A habeas

petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him.").

A federal court may not, however, proceed to the merits of a claim simply because that claim satisfies the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A) and § 2254(c) because of a lack of available state process. Rather, "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred." *Coleman*, 501 U.S. at 750; *see also Lines v. Larkins*, 208 F.3d at 160 (quoting *McCandless v. Vaughn*, 172 F.3d at 160).

Like exhaustion, the procedural default doctrine is based on principles of comity, and is intended to "reduce[] friction between the state and federal court systems by avoiding the 'unseem[liness]' of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan*, 526 U.S. at 844-45. A claim is procedurally defaulted if the state court of last resort refuses to consider its merits. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available."); *County Court v. Allen*, 442 U.S. 140, 152-53 (1979) (finding that, because the trial court "ruled on the merits" rather than on some state procedural ground, that the court "implicitly decided that there was no procedural default").

The Commonwealth argues that a number of Petitioner's claims or subclaims were not fairly presented, because

Petitioner either never raised them at all, or did not analyze them in sufficient depth to put the Pennsylvania Supreme Court on notice that a federal claim was being raised. The Commonwealth further argues that such claims or subclaims would not be reviewable now in state court, because 42 Pa. Cons. Stat. § 9545(b), the timing requirement of PCRA, would bar a subsequent petition by Petitioner, and therefore the exhaustion requirement as to these subclaims is satisfied by procedural default "because there is 'an absence of available State corrective process.'" *McCandless v. Vaughn*, 172 F.3d at 260 (citing 28 U.S.C. § 2254(b)).

We agree with the Commonwealth that any claims not fairly presented by Petitioner could not be raised in state court now because of the operation of § 9545(b). *See Holland v. Horn*, -- F. Supp. 2d --, No. 99-CV-2251, slip op. at 17-24, 2001 WL 704493, *9-*13 (E.D. Pa. April 25, 2001). Petitioner had already amended his PCRA petition several times, but he could have amended it again during the sixty-day window of opportunity from November 17, 1995, when § 9545(b) was enacted, until it took effect on January 16, 1996, to include any omitted claims, without running afoul of the statute's one year time limit. Not only does § 9545 bar Petitioner from raising any omitted claims in a subsequent PCRA petition; it also causes such claims before us to be procedurally defaulted. Section 9545 is an independent and adequate state ground barring our review of such claims absent a showing of cause and prejudice. *See Holland*, -- F. Supp. 2d at --, slip op. at 17-24, 2001 WL 704493, *9-*13; *see also* Part III. B. 2, *infra*.

Nearly all of the claims and subclaims explicitly raised by Petitioner are exhausted under 28 U.S.C. § 2254 by virtue of their having been fairly presented in state court. Upon reviewing the state court pleadings and the claims

before us, we find that most of the legal theories and supporting facts asserted in the federal habeas petition are "substantially equivalent" to those presented to the Pennsylvania Supreme Court and Pennsylvania trial courts, *see Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996), and the method of legal analysis to be applied by us was available to the state courts, *see McCandless v. Vaughn*, 172 F.3d at 261. Therefore, the vast majority of claims and subclaims explicitly raised are exhausted by virtue of having been fairly presented to the Pennsylvania Supreme Court and trial-level state courts, and the few that were not fairly presented are exhausted by application of the time bar of § 9545(b).

B. Standards Of Review

1. Review Under The AEDPA

Under the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, a petitioner may not be granted federal habeas relief if his claims were adjudicated on the merits in state court,[5] unless the state court decision was

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[5] If a court relied on procedural grounds to decline to decide a federal claim, or if it examined the merits of a claim only in the course of deciding a different claim, it has not adjudicated the claim on the merits. *See Sistrunk v. Vaughn*, 96 F.3d 666, 675 (3d Cir. 1996) (citing *Harris v. Reed*, 489 U.S. 255 (1989)). Otherwise, if the court cites to the controlling Supreme Cout precedent or if it cites to state precedent or the progeny of state precedent that relies on the Supreme Court precedent, or even if no law is cited, and the decision is neither contrary to nor an unreasonable application of the relevant Supreme Court precedent, the state court will be deemed to have decided the federal claim on the merits. *See Werts v. Vaughn*, 228 F.3d 178, 202-05 (3d Cir.

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> (1) . . . contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
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> (2) . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Factual issues decided by the state court "shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).[6]

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2000). In rare cases, the state court cites to and applies Supreme Court precedent that is not actually controlling with respect to the federal claim that the state court is attempting to adjudicate. In such cases the state court has not adjudicated the federal claim on the merits. *See Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) (finding that the state court should have analyzed a claim of right to counsel under *United States v. Cronic*, 466 U.S. 648 (1984), but instead analyzed the claim as one of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984)); *Hameen v. State of Delaware*, 212 F.3d 226, 248 (3d Cir. 2000) (finding that the state court should not have relied on *Gregg v. Georgia*, 428 U.S. 153 (1976), because it did not control the claim before it).

[6] If no state court record exists with respect to a petitioner's claims, and Petitioner has "failed to develop the factual basis of the claim in state court," a federal evidentiary hearing may be held on the matter only if the petitioner satisfies two narrow criteria. First, he must show that his claim relies on either a new, retroactive constitutional law that was previously unavailable, or a factual predicate that could not, with the exercise of due diligence,

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The "threshold question under AEDPA is whether [petitioner] seeks to apply a rule of law that was clearly established at the time his state court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). An existing federal law is "clearly established" unless it either "breaks new ground or imposes a new obligation on the States," *id.* at 391, or was not "dictated" by precedent existing when the petitioner's conviction became final. *Id.*; *see also Teague v. Lane*, 489 U.S. 288, 301 (1989). The fact that a federal standard "of necessity requires a case-by-case examination of the evidence, obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams*, 529 U.S. at 391 (citation omitted) (finding the *Strickland* standard for ineffective assistance of counsel to be clearly established).

A state court decision is contrary to federal law as determined by the Supreme Court "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413. "[I]t is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999). It is

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have been previously discovered. Second, the petitioner must establish that the facts supporting his claim are sufficient to establish, by clear and convincing evidence, that but for constitutional error no reasonable fact-finder would have found him guilty of the underlying offense. 28 U.S.C. § 2254(e)(2).

likewise not necessary for a petitioner to cite factually identical Supreme Court precedent. He may instead rely on a Supreme Court rule that, by virtue of its factual similarity or intention to apply to variant factual situations, "can fairly be said to require a particular result in a particular case." *Id.* at 888-89.

A state court adjudication is an "unreasonable application" of clearly established federal law if the court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was *objectively unreasonable*." *Id.* at 409 (emphasis added). Although the term "unreasonable" is often difficult to define, the most important distinction is that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). A state court decision cannot be found unreasonable unless, "evaluated objectively and on the merits, [it] resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Matteo*, 171 F.3d at 890. The Third Circuit is of the view that in evaluating reasonableness, federal habeas courts are not precluded from considering the decisions of lower courts. *Matteo*, 171 F.3d at 890 (citing *O'Brien v. DuBois*, 145 F.3d 16, 25 (1st Cir. 1998)). In fact, such lower court decisions may serve as "helpful amplifications" of Supreme Court precedent. *Id.*

2. Procedurally Defaulted Claims

A federal claim is procedurally defaulted and federal habeas review of the claim is barred if the state court of last

resort refuses to consider its merits, *see Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991), if such refusal is "pursuant to an independent and adequate state procedural rule," *see Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000).

In its decision on Petitioner's PCRA appeal, the Pennsylvania Supreme Court relied on two procedural grounds to refuse to adjudicate the merits of a number of Petitioner's federal claims. *See Holloway II*, 739 A.2d 1039, 1044 (1999). First, it relied on its long-established rule that the failure of trial counsel to contemporaneously object to errors occurring at trial, and thus preserve these issues for appeal, results in a waiver of these issues. *See id.* (citing *Commonwealth v. Williams*, 660 A.2d 1316 (1995)). Such issues may only be considered on their merits if trial counsel is first shown to be constitutionally ineffective for failing to preserve the issues for appeal, and thus the Pennsylvania Supreme Court considered all such claims raised by Petitioner as claims of trial counsel's ineffectiveness. *See id.* (citing *Commonwealth v. Albrecht*, 720 A.2d 693 (1998)). The court also relied on the interplay between two provisions of the PCRA, 42 Pa. Cons. Stat. § 9543(a)(3), which bars the Pennsylvania Supreme Court from hearing any claim that was previously litigated on direct appeal or was waived, and § 9544(b), under which "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, . . . on appeal or in a prior state postconviction proceeding," to find that any claim not raised at trial, on direct appeal, before the PCRA trial court, or any combination thereof, was waived. *Holloway II*, 739 A.2d at 1044. Again, however, such waiver could be overcome if counsel were shown to be constitutionally ineffective for failing to raise such claims at the proper time, and thus all such claims were considered to be, and adjudicated as, claims of ineffectiveness of counsel

for failure to timely raise the claims. *Id.* If either of these grounds are independent and adequate state procedural rules, we would be barred from examining the underlying claims on the merits.[7]

A state procedural rule is considered independent if it does not rely on the merits of a federal claim or "rest[] its decision primarily on federal law."[8] *Harris v. Reed*, 489 U.S. 255, 260-61 (1989); *see also Ford v. Stepanik*, 1998 WL 297626, at *3 (E.D. Pa. June 2, 1998). Such a rule is adequate under the procedural default doctrine if it is "firmly established and regularly followed" within the state. *James v. Kentucky*, 466 U.S. 341, 348 (1984); *see also Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (stating that a state procedural rule may not be adequate if "the defendant . . . could not be 'deemed to have been apprised of its existence'"); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) ("[A] state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'"); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). *But see Jamison v. Collins*, 100 F. Supp. 2d 521, 559 (S.D. Ohio 1998) ("A state procedural rule that was not firmly established at the time it should have been complied with by the

[7] On PCRA appeal, the Pennsylvania Supreme Court also ruled that it could not examine several claims that it had addressed on direct appeal, because they fell within the "previously litigated" bar of 42 Pa. Cons. Stat. § 9543(a)(3). We need not decide whether this bar is also bars us from examining such claims on the merits; we simply review any claims that were adjudicated on direct appeal under the AEDPA standard. If such claims were not actually adjudicated, however, we will examine them under the standard outlined in Part III. B. 3., *infra*.

[8] There is no dispute that such procedural rules are independent.

petitioner, and therefore is applied retroactively, is not an adequate state ground that bars federal habeas review."). The phrase "firmly established and regularly followed" requires that a petitioner have some sort of notice, at the time of his state court procedural default, of a state procedural rule's potential impact on his case before that rule can be considered adequate. *See Ford v. Georgia*, 498 U.S. at 423-24; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457 (1958) ("[A] local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures . . . cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court . . . ."); *Cabrera v. Barbo*, 175 F.3d 307, 313 (3d Cir. 1999) ("The reason for these requirements is that a petitioner should be on notice of how to present his claims in the state courts if his failure to present them is to bar him from advancing them in a federal court."). The Third Circuit found this notice requirement satisfied when a presiding judge in a collateral proceeding specifically asked a petitioner if he had anything else to present. *Cabrera*, 175 F.3d at 313 (finding that petitioner had "ample opportunity" to present his defaulted claims in state court because "the judge at the hearing repeatedly gave Cabrera, who was present at the hearing, an opportunity to say 'anything'").

Petitioner asserts that the §§ 9544(b) and 9543(a)(3) rules are not adequate, because the "relaxed waiver" doctrine makes such rules not "firmly established and regularly followed." Under the "relaxed waiver" doctrine, the Pennsylvania Supreme Court reserved its discretion "to address all issues arising in a death penalty case, irrespective of a finding of waiver." *Commonwealth v. Travaglia*, 661 A.2d 352, 356 n.6 (Pa. 1995). Petitioner suggests that the doctrine's existence led him to believe that his state collateral claims would

be preserved despite his violation of §§ 9544(b) and 9543 (a)(3), and that he therefore was without proper notice of the statute's potentially preclusive effect.

We believe that these PCRA rules are adequate state grounds barring our review of the underlying claims on the merits. Petitioner is correct in citing the existence of such a doctrine, at least prior to the PCRA amendments of November 17, 1995, at which time the doctrine appears to have been eradicated by the language of those amendments, which state that "[e]xcept as specifically provided otherwise, all provisions of this subchapter shall apply to *capital* and noncapital cases." 42 Pa. Cons. Stat. § 9542 (emphasis added). The Pennsylvania Supreme Court verified this interpretation in *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998), in which it upheld the constitutionality of the 1995 PCRA amendments against challenges that they could not, in conjunction with the relaxed waiver doctrine, provide reliable notice of the availability of state collateral review. The clear language of the 1995 amendments, in conjunction with the Pennsylvania Supreme Court's ruling that the relaxed waiver doctrine could not trump the statute's authority, leads us to conclude that Petitioner could not have justifiably relied on the relaxed waiver doctrine as grounds for failing to timely raise his claims. *See Holland v. Horn*, -- F. Supp. 2d --, No. 99-CV-2251, slip op. at 19 n.11, 2001 WL 704493, *10 (E.D. Pa. April 25, 2001) (finding that to the extent relaxed waiver existed, it ended with the enactment of the 1995 PCRA amendments).

Furthermore, the relaxed waiver doctrine was never as broad or as widespread as Petitioner asserts. *See Commonwealth v. Williams*, 660 A.2d 1316, 1319-1320 (Pa. 1995) ("While we have recognized that waiver rules are often relaxed in capital cases, . . . we have held in other capital

cases that issues not raised before the trial court were waived. . . . This Court does not countenance trial counsel intentionally sitting by silently at trial only later to complain of trial errors on appeal after an unfavorable verdict. That a matter is a death penalty case in no way relieves trial counsel of the duty to raise appropriate contemporaneous objections at trial to allow the trial court to cure any alleged error as well as preserve issues for appellate review.") (citing *Commonwealth v. Goins*, 495 A.2d 527, 530 (1985) (plurality) (appellant's claims of prosecutorial misconduct are waived for trial counsel's failure to object); *Commonwealth v. Peterkin*, 513 A.2d 373 (1986), *cert. denied*, 479 U.S. 1070 (1987) (even though issue of whether exclusion of prospective jurors was of constitutional dimension, the issue was waived because defense counsel indicated he had no objection to the challenges for cause of the two jurors); *Commonwealth v. Szuchon*, 484 A.2d 1365 (1984) (whether prospective jurors were improperly excluded is waived and cannot be addressed for the first time on appeal because trial counsel failed to object to the challenge of prospective jurors or to rehabilitate them through further questioning)). Clearly, relaxed waiver was not so widespread that Petitioner could have justifiably relied on it to believe that the PCRA waiver rules regarding the requirement of raising claims at the earliest opportunity were not "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348 (1984). The phrase "firmly established and regularly followed" requires that a petitioner have some sort of notice, at the time of his state court procedural default, of a state procedural rule's potential impact on his case before that rule can be considered adequate. *See Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). Nor could Petitioner be deemed not "'to have been apprised of [the] existence'" of such rules. *Id.* (quoting *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457 (1958)). Because the relaxed waiver doctrine was not so broadly or frequently

applied as to justify reliance on it or justify a belief that the PCRA rules at issue were not "firmly established and regularly followed," we find such rules to be "adequate" so as to bar our direct review of the underlying claims.

Even if the relaxed waiver doctrine were sufficiently widespread such that Petitioner could have believed that any claim not raised on direct appeal could be raised on the merits in his PCRA petition without a showing that direct appeal counsel was ineffective for failing to assert the claim, Petitioner would still be faced, as to many claims, with the waiver that occurred when trial counsel failed to preserve such issues for appeal. Such waiver rests not only on the PCRA rules, but on the longstanding independent rule that any issues not preserved by trial counsel's contemporaneous objection could only be reviewed as claims of trial counsel's ineffectiveness for failing to raise them. The "relaxed waiver" doctrine never, or at least rarely, applied to such waivers, *see Commonwealth v. Williams*, 660 A.2d at 1316, and cases cited therein, and therefore the contemporaneous objection rule must also be considered "adequate" so as to bar our direct review of the underlying trial errors.

Federal review of defaulted claims is prohibited, unless Petitioner is able to "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law."[9] *Coleman*, 501 U.S. at 750. The Supreme

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[9] Another exception to the procedural default doctrine is recognized in cases where preclusion of federal review would result in a "fundamental miscarriage of justice." *Murray*, 477 U.S. at 495. This is a particularly rare exception, applicable only in cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* at 496.

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Court has identified three circumstances in which procedural default may be excused for cause: (1) if the "factual or legal basis for a claim was not reasonably available to counsel," (2) if some interference by officials made compliance [with state procedural rules] impracticable,"[10] or (3) "if the procedural default is the result of ineffective assistance of

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Actual innocence alone, however, is not a cognizable claim for habeas relief; petitioner must instead "*supplement[]* his constitutional claim with a colorable showing of factual innocence." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (emphasis in original). To establish actual innocence due to errors at trial, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). This represents a "stronger showing than that needed to establish prejudice." *Id.* In order to demonstrate actual innocence as a result of errors committed at sentencing, "one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Petitioner does claim generally that the many errors in his case resulted in a colorable showing of factual innocence, but we find that none of the underlying claims that go to innocence have merit, so no miscarriage of justice existed with respect to any of those claims.

[10] Petitioner argues that Commonwealth should be estopped from arguing that certain claims were defaulted because of the statement of ADA Ronald Eisenberg to the Pennsylvania Supreme Court in response to Petitioner's attempts to file pro se briefs on direct appeal while represented: "[Should he] later be dissatisfied with the outcome of his direct appeal, he may then pursue any additional claims through state collateral review." (Pet. Reply Mem. App. A.) This argument has no merit. On the original

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record, we cannot even determine which claims would fall within the scope of this argument, because the pro se direct appeal filing is not in the record. The record includes Petitioner's pro se PCRA petition and Petitioner alleges that the direct appeal filing had the same claims as those in the pro se PCRA petition, but there is no evidence that such is the case. During the evidentiary hearing that we held for the sole and limited purpose of establishing direct appeal counsel's reasons for not raising the *Batson* claim, in order to determine whether cause was shown for the procedural default that arose from the failure to raise the claim on direct appeal, Petitioner submitted as Petitioner's Exhibit 1 the missing pro se filing. However, as we explain *infra* at n.56, we may only consider such evidence for the purpose of determining whether cause exists. Furthermore, we find that the letter is ambiguous. ADA Eisenberg's statement can as easily understood to mean that Petitioner could pursue claims directly on the merits in collateral proceedings as to mean that in collateral proceedings Petitioner could allege that direct appeal counsel was ineffective for not raising the omitted claims.

Finally, the letter refers to Petitioner as being represented. The Pennsylvania Supreme Court is not required to accept and consider pro se filings from a represented appellant, but may do so in its discretion. *See Commonwealth v. Ellis*, 626 A.2d 1137, 1139 (Pa. 1993) ("[T]here is no constitutional right to hybrid representation either at trial or on appeal . . . and no statute mandates hybrid representation on appeal.") (citing *Commonwealth v. Colson*, 490 A.2d 811, 821 (1985) (no right to hybrid representation at trial)); *id.* at 1140 ("[I]f appellate counsel's arguments do not prevail and the appellant is convinced that his own unheeded arguments should have been presented, he need only file a petition pursuant to the Post Conviction Relief Act, claiming appellate counsel's ineffectiveness."); *see also, e.g., Commonwealth v. Henry*, 491 A.2d 193, n.2 (Pa. Super. 1985); *Commonwealth v. Kibler*, 439 A.2d 734 (Pa. Super. 1982). Even when the Pennsyl-

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counsel."[11] *Murray v. Carrier*, 477 U.S. 478, 488 (1986). If cause is established, a petitioner must then also demonstrate actual prejudice as a result of the procedural default. Actual prejudice requires that the petitioner "shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). Petitioner does not contend that either of the first two circumstances demonstrating cause are relevant to his claims, except as we have explained in note 10, and we agree and so find. Although Petitioner argues that none of his claims are defaulted, he argues that if we were to find such a default, his trial and appellate counsel were constitutionally ineffective in not raising his defaulted claims. We will therefore limit our

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vania Supreme Court does consider such briefs, it often merely dismisses the claims therein as being without merit with little or no discussion.

Each of these three reasons is sufficient for us to find that the Commonwealth should not be estopped because of the Eisenberg letter from arguing procedural default of claims not raised in the counseled direct appeal brief, and we so find.

[11] The AEDPA has, in some circumstances, eliminated the cause and prejudice exception to procedural default in lieu of a more deferential standard of review for all capital habeas claims arising under § 2254. *See* 28 U.S.C. § 2264. This standard only applies, however, to convictions in states that satisfy the criteria set forth in 28 U.S.C. § 2261. Since Pennsylvania does not satisfy these criteria, we therefore continue to apply the traditional cause and prejudice analysis in Petitioner's case. *See Death Row Prisoners of Pennsylvania v. Ridge*, 106 F.3d 35, 36 (3d Cir. 1997).

analysis of Petitioner's defaulted claims to the adequacy of his legal representation.[12]

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[12] As mentioned above, Petitioner fairly presented claims of ineffective assistance of trial and appellate counsel in the state courts. The Pennsylvania Supreme Court determined that his constitutional right to counsel had not been violated. *Holloway I*, 572 A.2d at 691-94; *Holloway II*, 739 A.2d at 1044-48. Therefore, he may now argue that his deficient representation amounts to an appropriate ground for finding cause. *See Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) ("'[A] claim of ineffective assistance' generally must 'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.'" (quoting *Murray v. Carrier*, 477 U.S. 478, 489 (1986)); *Holloway II*, 739 A.2d 1039, 1044 (Pa. 1999) (acknowledging that Petitioner alleges "that all his prior counsel were ineffective").

28 U.S.C. § 2254(d) empowers federal courts to grant a writ of habeas corpus pursuant to "any claim that was adjudicated on the merits in State court proceedings" if the federal court finds that the state adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law." Recent decisions have refrained from applying this highly deferential standard in cases involving claims of cause and prejudice to excuse state procedural default. *See Edwards*, 529 U.S. at 452-54. In *Edwards*, the Supreme Court required that claims of cause on the grounds of ineffectiveness of counsel had to be exhausted in state court. *Id.* The Court did not address whether, in reviewing exhausted claims of ineffectiveness of counsel, we should now apply the standard set forth in 28 U.S.C. § 2254(d), as opposed to that established by *Murray v. Carrier*. *Id. See also Holland v. Horn*, –F. Supp. 2d –, No. 99-CV-2251, slip op. at 62-65, 2001 WL 704493, *29-31 (E.D. Pa. April 25, 2001). We believe that the procedural default doctrine addressed by the Supreme Court in *Murray v. Carrier* is control-

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Ineffective assistance of counsel is a violation of the Sixth Amendment, which guarantees every defendant "[i]n all criminal prosecutions . . . the Assistance of Counsel for his defense." A showing of ineffective assistance requires satisfaction of two components. First, counsel must have been so deficient that his "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Second, a petitioner must show that counsel's "deficient performance prejudiced the defense." *Id.* In determining whether counsel acted reasonably, there remains a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *Diggs v. Owens* , 833 F.2d 439, 444-45 (3d Cir. 1987). Counsel's actions are evaluated "'on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (quoting *Strickland*, 466 U.S. at 690). A lack of success is not proof of unreasonableness, *see Strickland*, 466 U.S. at 689, and strategic and tactical decisions are not

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ling and unchanged by 28 U.S.C. § 2254(d). *Id.*

The standard set forth in 28 U.S.C. § 2254(d) applies to a federal court's review of "any claim." When a petitioner, in trying to establish "cause" for his procedural default, contends that his counsel was ineffective, he is not seeking review of a state court's determination of ineffectiveness of counsel; i.e. he is not seeking review of the state court's decision as a ground for habeas relief. Rather, he is using his ineffectiveness of counsel allegation to excuse his failure to present claims to the state court. Cause and prejudice are merely an excuse to overcome a procedural default; they are not a claim in themselves. Therefore, our review of an allegation of ineffectiveness as an excuse is independent of our review of the Pennsylvania Supreme Court's adjudication of an ineffectiveness claim.

grounds for an ineffective assistance claim unless counsel displayed "ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles." *Commonwealth of the Virgin Islands v. Weatherwax* ("*Weatherwax I*"), 20 F.3d 572, 579 (3d Cir. 1994), *rev'd on other grounds*, *Commonwealth of the Virgin Islands v. Weatherwax* ("*Weatherwax II*"), 77 F.3d 1425, 1435 (3d Cir. 1996).

Prejudice exists if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also United States v. DeRewal*, 10 F.3d 100, 104 (3d Cir. 1993) (defining prejudice as deprivation of "a trial whose result is reliable"). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In assessing the likelihood that the result would have been different, courts "must consider the totality of the evidence before the judge or jury." *Id.* at 695. This standard of prejudice applies when counsel's deficiencies deprive his client of a substantive or procedural right. *See Williams v. Taylor*, 529 U.S. 362, 391-93.

In a limited number of cases, when counsel's deficiencies do not deprive his client of another substantive or procedural right, the *Strickland* prejudice analysis is insufficient to determine whether a petitioner has been deprived of his right to assistance of counsel, and the focus is instead on fundamental fairness. *Williams*, 529 U.S. at 391-93 (citing *Lockhart*, 506 U.S. at 369; *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) ("[T]he 'benchmark' of an ineffective assistance claim is the fairness of the adversary proceeding.")). In order to establish prejudice as a result of deficient representation in such cases, a defendant must demonstrate that "counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered

unfair and the verdict rendered suspect." *Lockhart*, 506 U.S. at 369 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)). When counsel's deficiency *does* result in the deprivation of a right that his client is entitled to, however, "[c]ases such as [*Nix* and *Lockhart*] do not justify a departure from a straightforward application of *Strickland*." *Williams*, 529 U.S. at 393.

The prejudice standard applied in the ineffective assistance context is nearly identical to the actual prejudice standard for excusing a procedural default articulated in *Coleman*. As a result, we may rely on any findings of prejudice within our ineffectiveness inquiry to satisfy any claims of actual prejudice to Petitioner. Furthermore, the standard used to determine ineffective assistance as grounds for cause is identical to that applied with respect to substantive claims for relief under the Sixth Amendment. As a result, we rely on our above explanation of the *Strickland* standard in all our ineffective assistance inquiries.

If we find sufficient cause and prejudice under *Coleman* to excuse the procedural default caused by the failure of trial counsel to contemporaneously object, or caused by direct appeal counsel for failure to raise a claim, or both, as would be necessary in some cases, we believe we would then exercise plenary review the of the merits of the underlying claim. *See, e.g., Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) ("It follows that when, although properly preserved by the defendant, the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the deferential standards provided by AEDPA and explained in *Williams* do not apply . . . [and] the federal habeas court must conduct a de novo review over pure legal questions and mixed questions of law and fact, as a court would have done prior to the enactment of AEDPA."); *Hameen v. State of*

Delaware, 212 F.3d 226, 248 (3d Cir. 2000) ("[U]nder the AEDPA the limitation on the granting of an application for a writ of habeas corpus is only 'with respect to any claim that was adjudicated on the merits in state court proceedings.' Hence we exercise pre-AEDPA independent judgment . . . ."); *Smallwood v. Gibson*, 191 F.3d 1257, 1264 (10th Cir. 1999) (finding that under AEDPA "we are generally subject to two different frameworks of review, depending upon whether the state courts addressed the merits of the claim for relief. If the state courts have not heard the claim on its merits, we review the district court's legal conclusions de novo). Even if the Pennsylvania Supreme Court determined, in the course of adjudicating a claim of ineffectiveness, that the underlying, procedurally defaulted claim had no merit, we would not be bound by this purported determination of the merits of that claim. *See Sistrunk v. Vaughn*, 96 F.3d 666, 673 (3d Cir. 1997).

We also note that in *Sistrunk*, the Third Circuit explained that the doctrine that an independent and adequate state ground bars federal relief "applies whenever the state court relies upon such an adequate and independent state ground, even when it goes on to address the federal claim in an alternative holding." *Id.* (citing *Harris v. Reed*, 489 U.S. 255 (1989)). The Third Circuit further reasoned that "[i]f federal review of a federal claim is foreclosed when the state court addresses the merits of the federal claim in an alternative holding directed to that claim, surely federal review must also be foreclosed when the state court addresses the merits of the federal claim only in the course of resolving another, independent claim." *Id.* at 675. Thus, if the Pennsylvania Supreme Court relied upon an independent and adequate state ground with respect to any subclaim and we find the procedural default to be excused, we may examine the underlying claim and apply de novo review to it rather than

the AEDPA standard. *See Appel v. Horn*, 250 F.3d at 210; *Hameen v. State of Delaware*, 212 F.3d at 248. We would still presume that any state court's factual determinations are correct, rebuttable only on a showing of clear and convincing evidence. *See Appel*, 250 F.3d at 210 (citing 28 U.S.C. § 2254(e)(1)); *see also Smallwood*, 191 F.3d at 1264 (state court factual findings are reviewed for clear error).

3. Fairly Presented Claims That Were Neither Adjudicated On The Merits, Nor Procedurally Defaulted

As with claims for which a procedural default was overcome by a showing of cause and prejudice, we would also review de novo any claim that was not adjudicated on the merits by the Pennsylvania Supreme Court due to the erroneous application of the "previously litigated" bar of 42 Pa. Cons. Stat. § 9543(a)(3) and § 9544(a), because such a bar would not be "adequate" to prevent our review. In the course of deciding Petitioner's PCRA appeal, the Pennsylvania Supreme Court invoked the "previously litigated" bar to decline to review a number of claims, asserting that it had addressed such claims on direct appeal. *Holloway II*, 739 A.2d at 1044. We respectfully find that, in several instances, some of these claims or subclaims were not actually addressed by the Pennsylvania Supreme Court, even if its decision in *Holloway I* is read broadly. Even though the Pennsylvania Supreme Court could have properly found such claims to be waived for failure to raise them on direct appeal, it did not rely on that procedural bar, and we are therefore not bound by the existence of such a bar, even though we would be bound by it had the court asserted it. Because such claims are therefore not procedurally defaulted, and were not, in fact, adjudicated on the merits, but were fairly presented, we

review them de novo. *See Appel v. Horn*, 250 F.3d at 210; *Hameen v. State of Delaware*, 212 F.3d at 248.

C. Petitioner's Substantive Claims

1. Claim I–Exclusion Of Evidence Of Alleged Accomplice's Acquittal

Petitioner claims that the exclusion of his knowledge and the knowledge of Detective Gilbert, who interrogated him, of the acquittal of Freeman, offered for the purpose of showing Petitioner's state of mind and the detective's motive to fabricate Petitioner's alleged confession, was a violation of Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, present a defense, and to a fair trial. He also claims that all prior counsel were ineffective to the extent that they failed to fully, timely, and properly raise this issue. Petitioner argues that because he knew that his alleged accomplice, Freeman, had been acquitted, he had a strong motive not to make any statement. According to Petitioner, the only evidence against either Freeman or him was the statement of Shirley Baker, and Freeman was acquitted on that evidence, so Petitioner allegedly reasoned that he would likewise be acquitted, and therefore he never would have made the statement. Petitioner further argues that because the detective also knew of both Freeman's acquittal and Baker's testimony, the detective concocted Petitioner's alleged confession using Baker's testimony, so that at least someone would be convicted for the Caldwell murder.

Petitioner raised these issues both in his amended PCRA Petition to the PCRA hearing court and in his initial

PCRA brief before the Pennsylvania Supreme Court.[13] Because the Pennsylvania Supreme Court found that these issues were not raised on direct appeal or before the PCRA trial court, however, the Pennsylvania Supreme Court deemed them to be waived.[14] *Commonwealth v. Holloway*

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[13] The Commonwealth takes issue with Petitioner's allegation that his previous claim rested on all of these amendments, arguing that some were not raised. Petitioner did claim, however, that his rights to due process and a fair trial were violated, so we find that he did raise claims under the Fifth, Sixth, and Fourteenth Amendments. We understand Petitioner to be arguing that he was deprived of "a meaningful opportunity to present a complete defense," which could be brought as either a due process or fair trial claim. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *see also Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment."). Because substantially the same facts and legal theories were available to the Pennsylvania Supreme Court, and, notwithstanding the Pennsylvania Supreme Court's assertion to the contrary, also to the PCRA hearing court, we find that Petitioner's Fifth, Sixth, and Fourteenth Amendment claims were fairly presented. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). Petitioner has made no argument to us regarding the alleged Eighth Amendment violation, and therefore we deem such a claim to be waived.

[14] Although Petitioner's trial counsel did not use the magic word "objection," when Judge Sabo ruled at the suppression hearing that Freeman's acquittal may not be referred to at trial, trial counsel strenuously argued that such information was crucial to Petitioner's defense. (N.T. 5/13/86, at 89-93.) The Supreme Court of Pennsylvania, however, appears to have treated this claim as waived both for a failure to contemporaneously object at trial

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(*Holloway II*), 739 A.2d 1039, 1044-45 (Pa. 1999). Because Petitioner alleged ineffectiveness of all prior counsel, however, the court adjudicated the claims from the standpoint of a ineffectiveness claim. *See id.* We must therefore do so as well, applying the AEDPA standard.

In deciding the ineffectiveness claim, the Pennsylvania Supreme Court noted that Petitioner's underlying federal claim was based on a due process theory, explained the claim, and then decided that the claim had no merit. *See Holloway II*, 739 A.2d at 1044-45. The court then proceeded to examine Petitioner's state law claim as to the exclusion of this evidence. Petitioner argues that because the case relied upon by the Pennsylvania Supreme Court in this latter discussion, *Meredith v. Commonwealth*, 425 A.2d 334 (1981), was simply a state law case, and neither it nor any case it cited to discussed due process issues, the court never decided the federal claim. We find that the court did not adjudicate the federal claim within the meaning of the AEDPA, 28 U.S.C. § 2254(d), but that it adjudicated the claim of ineffectiveness of counsel for failure to raise this evidentiary issue previously on the basis that neither the federal claim nor the state claim had merit. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) (counsel cannot be ineffective for failing to raise a meritless claim). The court's

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and for failure to raise on direct appeal as required by 42 Pa. Cons. Stat. §§ 9543(a)(3) and 9544(b). We will assume that both of these bases for the waiver are independent and adequate state grounds barring our review of the underlying substantive claim, and that each were properly applied by the Pennsylvania Supreme Court as to this claim. Therefore, to review this claim on the merits, we would be required to find cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. *See* Part III. B. 2, *supra*.

brief description of Petitioner's due process claim and the decision that the claim has no merit would suffice for us to conclude that it considered and decided the federal claim so as to be "adjudicated on the merits" for the purpose of applying AEDPA, were the claim in such a procedural posture that the court was examining the claim directly, *see Werts v. Vaughn*, 228 F.3d 178, 204 (3d Cir. 2000), therefore they suffice for us to conclude that it decided the issue as an underlying basis for the claim of ineffective assistance of counsel.[15] It appears that the court simply moved on to examine the state-law issue without using a transition sentence.

We have reviewed the court's ineffectiveness adjudication under the AEDPA standard, and we find that it is neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. In the process of our review, we also find that we agree with the Pennsylvania Supreme Court that the underlying claim has no merit. Therefore, not only do we find that the Pennsylvania Supreme Court's decision must be upheld under the AEDPA and thus deny relief; if we were to examine the underlying claim de novo, either by concluding that it had been fairly presented but not adjudicated on the merits, or after a showing of cause and prejudice, we would likewise deny relief.[16]

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[15] We conclude that the court decided the ineffectiveness claim based not only upon the underlying due process claim, but also upon the underlying claims based on the rights to present a defense and to a fair trial. *See* n.13, *supra*.

[16] Because we have come to this conclusion, we need not examine whether Petitioner's procedural default for failing to

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Petitioner argues that under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986),[17] his rights to due process, to present a defense and to a fair trial were violated. He argues that he should have been permitted to offer evidence of his and Detective Gilbert's knowledge of Freeman's acquittal solely for the purpose of showing that Petitioner had no motive to make the statement and thus never would have, and that Detective Gilbert had a motive to create the statement.

The Supreme Court has traditionally been reluctant to "impose constitutional constraints on ordinary evidentiary rulings by state trial courts." *Crane*, 476 U.S. at 689. The Constitution gives trial judges "wide latitude" to exclude evidence that is "repetitive," "only marginally relevant," or that poses an undue risk of "harassment, prejudice, or confusion of the issues." *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Further, the Court has "never questioned the power of States to exclude evidence through the

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timely raise the claim can be excused by a showing of cause and prejudice or fundamental miscarriage of justice. Indeed, we need not even decide whether the claim really was defaulted. In addition to arguing that the PCRA and contemporaneous objection rules are either not independent and adequate state procedural grounds barring our review of the merits, or that they were erroneously applied to Petitioner, or both, Petitioner argues that Commonwealth should be estopped from arguing that the claim was defaulted. *See* n.10, *supra*. These issues are moot.

[17] *Crane* was decided after Petitioner's trial but before his direct appeal was final. Therefore Petitioner may use it as a basis for seeking the writ. *See* 28 U.S C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 390 (2000).

application of evidentiary rules that themselves serve the interests of fairness and reliability–even if the defendant would prefer to see the evidence admitted." *Crane*, 476 U.S. at 690 (citing *Chambers*, 410 U.S. at 302.). Nevertheless, the Court has held in a few limited cases that state court evidentiary rulings violated the defendant's Fifth or Sixth Amendment rights.

In *Chambers*, the Court held that under the facts of that case, the defendant's right to due process was violated. 410 U.S. at 286. The trial court had excluded evidence that a third person on separate occasions orally confessed to three different friends to the murder for which Chambers was convicted, under circumstances that bore substantial assurances of trustworthiness, as well as evidence that this person made, but later repudiated, a sworn written confession. *Id.* at 287-90. The testimony of the three persons to whom the oral confessions were made, as well as the repudiated written statement were excluded as hearsay, because Mississippi recognized no exception for admissions against penal interest. Further, because of Mississippi's common-law voucher rule, the trial court prevented Chambers from cross-examining this third person when he called him as a witness. The Court held that, due to this combination of evidentiary rulings, Chambers was deprived of his right to due process. The Court emphasized that it was establishing no new principles of constitutional law and *limited* its holding to the facts and circumstances of the case before it. *Id.* at 302-303. Therefore *Chambers* provides little support for Petitioner.

Crane, which dealt with the exclusion of evidence of the circumstances surrounding a confession, is somewhat more helpful to Petitioner and is the standard by which we determine whether the Pennsylvania Supreme Court's decision that the exclusion of the evidence at issue did not violate

Petitioner's right to due process (and to a fair trial) was an unreasonable application of, or contrary to, federal law. *In Crane*, the trial court excluded testimony concerning the circumstances of defendant's confession because it pertained to the issue of voluntariness, which had been resolved against the defendant in a pretrial ruling.[18] 476 U.S. at 684-85. The defendant, however, offered the testimony to show that the statement was not credible. The Court held that the exclusion of the testimony deprived the defendant of a fair trial.

In *Crane*, the Court held that even though a trial court may have ruled on the issue of the voluntariness of a confession, a defendant may offer proof on the circumstances of the confession that go to voluntariness, not because voluntariness may be relitigated, but because those very same circumstances go to the credibility of the confession, i.e. whether the contents are true, and because such information is particularly relevant where there is no physical evidence linking the defendant to the crime and the entire defense is that, for a variety of reasons, the defendant's earlier admission of guilt should not be believed. Here, Petitioner wants to offer the circumstance of his state of mind, i.e. of the knowledge that he had, to show that he never would have made the statement he is alleged to have made, and therefore did not make it. *Chambers* deals with the credibility of the confession; the instant case deals with the credibility of the defendant on the stand denying that he made the statement; both are jury issues. The narrow language of *Crane* covers the

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[18] The sixteen-year-old defendant asserted that he "had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession." *Crane*, 476 U.S. at 685.

circumstances in which the confession occurred, i.e. the physical and psychological environment that yielded the confession. *Id.* at 688-89. Under such a reading, *Crane* would not provide an avenue for relief for a defendant who claims that he never even made the statement.

One could also read *Crane* as standing for the proposition that a defendant must be allowed to offer evidence that goes to credibility even though that evidence would be excluded if offered for a different reason, such as a pretrial issue that may not be relitigated or an issue that is otherwise irrelevant. *Crane* instructs that a defendant must have "a meaningful opportunity to present a complete defense" including "an opportunity to be heard." *Id.* at 690 (citing *In re Oliver*, 333 U.S. 257, 273 (1948)). Such opportunity requires that a defendant be allowed to present "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Crane* at 690. "[E]xclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecution's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)). Even under this broader reading of *Crane* Petitioner is not entitled to relief.

Here, the claim that the confession was fabricated was central to Petitioner's claim of innocence, and the evidence of Freeman's acquittal and Petitioner's knowledge thereof was central to Petitioner's claim that he had no motive to make such a statement, but rather had motive not to make it. For this case to fall within the teaching of *Crane*, there must be "competent, reliable evidence" that Petitioner knew of Freeman's acquittal. The only evidence is Petitioner's statement at the suppression hearing that he knew of

the acquittal, as well as Petitioner and his wife's blurting out at trial that Petitioner knew that Freeman had been acquitted. Such uncorroborated self-serving statements by Petitioner are inherently biased and therefore cannot be said to be competent and reliable. The statement by Petitioner's wife would seem to be based upon a hearsay statement by Petitioner.[19]

Petitioner's argument also rests on the assumption that because he knew of Freeman's acquittal, he would have had no motive to confess. This is a faulty assumption. People confess to crimes for a variety of reasons, even when it is not in their interest to do so. Here, there are several obvious reasons Petitioner could have confessed and tried to obtain leniency by implicating Johnson in the murder. First, as the Commonwealth argued at trial, he knew that Baker had implicated him in the murder and was willing to testify at his trial. Second, if he knew of Freeman's acquittal, he could be concerned that Freeman, his alleged co-conspirator, could make a statement or testify against Petitioner, implicating him in the murder. Freeman could not be retried, even if he implicated himself while implicating Petitioner. Therefore, what may have been the strongest reason for Freeman to refrain from making a statement about Petitioner's involvement no longer existed. Third, because Freeman had been acquitted, there was a higher likelihood that one of the other suspects in the case, of which Petitioner was one, was the murderer. Any of these motives, alone or in combination, could suffice for Petitioner to confess while attempting to

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[19] The common law evidence rule in effect in Pennsylvania at the time of the trial did not favor the admission of self-serving statements on behalf of the person making them. *Emmons v. McCreery*, 307 Pa. 62, 66-67 (Pa. 1932); Brown, *Pennsylvania Evidence* at 132, *VI Admissions*.

deflect the blame for the murder from himself as much as possible.

Petitioner's argument also rests on the deduction that he would be acquitted because Freeman had been acquitted on the same evidence. This reasoning is also faulty because there were separate trials and juries, and it also assumes that all of the evidence against each defendant would be the same, and it ignores credibility issues. There is no reason to believe that Petitioner and Freeman were equally credible, or even that each jury would find that the respective defendant was more credible than Baker. Further, the assumption requires that Baker's statement or testimony implicate both Petitioner and Freeman equally, and that the juries understand that to be the case. Baker's statement and testimony at the two trials show that it was Petitioner who did most, if not all, of the talking to Johnson, with Baker present, about the murder of Caldwell. Further, Baker testified and stated that Johnson either ordered Petitioner to commit the murder or alerted him to the opportunity to commit the murder. Johnson did not direct these comments at Freeman. Rather, it was Petitioner who ordered Freeman to accompany him. With such facts, it would be incorrect to deduce that because Freeman was acquitted, Petitioner would also be acquitted.

Finally, we must note that the reason for which Petitioner sought to introduce the evidence was very close to the reason for which it may not be offered. Evidence of an alleged co-conspirator's acquittal may not be introduced to persuade the jury that the defendant should likewise be acquitted. *See, e.g.*, *United States v. Sanders*, 95 F.3d 449, 454 (6th Cir. 1996); *United States v. Fernandez-Roque*, 703 F.2d 808, 813 (5th Cir. 1983); *Commonwealth v. Meredith*, 425 A.2d 334, 337 (Pa. 1981); *Commonwealth v. Quaranta*, 145 A. 89, 91-92 (Pa. 1928); *cf. United States v. Gambino*,

818 F. Supp. 536, 539 (E.D.N.Y. 1993), *aff'd* 59 F.3d 353, 367 (2d Cir. 1995) (evidence of defendant's own prior acquittal is not admissible for purpose of demonstrating government's motive to fabricate prosecution, based on alleged frustration with its inability to obtain conviction). Petitioner wanted to tell the jury that he himself made that deduction, and therefore he never would have made the statement. Such an offer of proof is tantamount to offering the acquittal for the purpose of enticing the jury to make the same deduction that the Petitioner allegedly made. Although Judge Sabo could have instructed the jury to limit the use of the evidence of the acquittal, it is doubtful that any instruction would have effectively prevented the jury from using it in just the way defendant claims he did. Therefore, under facts such as these where the impermissible use is inextricably intertwined with the use for which the defendant proffers the evidence, and where the impermissible use is highly likely to confuse the issues and prejudice the jury, the evidence may properly be excluded. Even for the limited reason for which the evidence was proffered, it posed an undue risk of causing confusion of the issues and prejudice against the Commonwealth.

Therefore, we must conclude that the exclusion of this evidence did not violate *Crane*. Thus the decision of the Pennsylvania Supreme Court that the exclusion of this evidence did not deny Petitioner due process of law was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court in *Crane*, and therefore its decision that counsel was not ineffective was not contrary to, or and unreasonable application of, *Strickland v. Washington*. Further, because in the process of reviewing the reasonableness of this decision we were forced to consider the merits of the underlying claim

ourselves, and concluded that *Crane* was not violated, we need not consider this issue further.

2. Claim II–Improper Closing Arguments By The Prosecutor

In his second claim, Petitioner argues that he is entitled to habeas corpus relief because the prosecutor's closing arguments were "egregiously improper and violated petitioner's rights to due process and a fair trial." (Pet. Mem. L. at 19.) Specifically, Petitioner makes four separate subclaims in support of his larger claim, objecting to various points in the prosecutor's closing argument that he feels deprived him of his rights. Petitioner alleges that:

1) The prosecutor claimed that Petitioner's alleged co-conspirator had been convicted, when in fact he had been found not guilty;

2) The prosecutor repeatedly stated his personal belief that Petitioner was guilty;

3) The prosecutor repeatedly stated his personal belief that Petitioner was lying; and

4) The prosecutor stated his belief that Petitioner was a threat to witness Shirley Baker, and she was afraid for her life, although there was no evidence in the record to support either assertion.

Before considering the claims themselves, we must determine whether they are properly before us. *See* 28 U.S.C. §2254(c). Petitioner's first three subclaims were presented both on the merits and as part of claims of ineffective assistance of counsel to the PCRA hearing court in the

Supplemental Amended Petition under PCRA and then to the Pennsylvania Supreme Court on PCRA review. Petitioner's fourth subclaim, that the prosecutor improperly stated his belief that Baker feared Petitioner would kill her, was presented on direct appeal. The Commonwealth argues that this claim was not fairly presented to the Pennsylvania Supreme Court because it was presented in a substantially different form. The Commonwealth offers no explanation for this argument, and the record discloses that the Pennsylvania Supreme Court both heard and ruled on an argument substantially similar to the one presented to this Court. *Holloway I*, 572 A.2d at 639. We therefore find that all four of these subclaims were fairly presented to the PCRA hearing court and the Pennsylvania Supreme Court on their merits, and the first three were also fairly presented as underlying claims of trial counsel's ineffectiveness for failing to object to the prosecutor's statements. Consequently, we also find that all of these subclaims, and the ineffectiveness claims as to the first three, are exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996).

The Supreme Court of Pennsylvania treated the first three subclaims as waived on their merits both for the failure of trial counsel to contemporaneously object to the prosecutor's alleged misconduct, and for the failure of appellate counsel to raise them on direct appeal as required by 42 Pa. Cons. Stat. §§ 9543(a)(3) and 9544(b). *Commonwealth v. Holloway* (*Holloway II*), 739 A.2d 1039, 1044-45 (Pa. 1999). Because Petitioner alleged ineffectiveness of all prior counsel, however, the court adjudicated these subclaims from the standpoint of ineffectiveness claims. *See id.* We will assume that both of these bases for the waiver are independent and adequate state grounds barring our review of the underlying substantive claims, and that each were properly applied by

the Pennsylvania Supreme Court as to these subclaims. Therefore, we will examine the ineffectiveness claims under the AEDPA standard, but we may only examine the underlying claims on the merits if cause and prejudice or a fundamental miscarriage of justice are shown to excuse Petitioner's procedural default. *See* Part III. B. 2, *supra*. The fourth subclaim will be examined simply as a prosecutorial misconduct claim, reviewed under the AEDPA, because it was raised on direct appeal.

a. Legal Background

There have been numerous cases before the U.S. Supreme Court regarding prosecutorial misconduct, and the Court has long attempted to define and discourage such actions. Given the wide range of error possible at trial, few prosecutorial misconduct cases have similar fact patterns, but the Supreme Court's guiding principles are nevertheless controlling. The Supreme Court has maintained stringent conduct requirements for prosecutors since the landmark case *Berger v. United States*, 295 U.S. 78 (1934), in which the Court held that the prosecutor carries with him the force and credibility of the government, and thus must act appropriately, with the ultimate goal not simply a conviction, but justice.

The Court has continued to refine these principles. Regarding claims similar to those that Petitioner raises here, the Court has observed that:

> Prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the

> jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18 (1984).

Under current federal law as determined by the Supreme Court, a federal court reviewing a claim of prosecutorial misconduct must examine the comments of the prosecutor in the context of the trial as a whole. *Id.*; *Donelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). If the alleged misconduct was indeed error, the court must determine if the error so infected the trial as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987). Thus, the ultimate issue under review is the effect of the error on the fairness of the trial itself, rather than the culpability of the prosecutor for committing error. *Smith v. Phillip*, 455 U.S. 209, 219 (1982).

b. Subclaims I-III: Ineffective Assistance Of Counsel Claims

Petitioner raised these claims both on the merits and as ineffective assistance of counsel claims to the Pennsylvania Supreme Court on PCRA appeal. That court deemed the substantive claims to be waived, therefore it only considered the ineffectiveness claims, holding that counsel could not have been ineffective because the underlying claims were without merit. We must review these ineffectiveness claims

under the AEDPA. Doing so, we hold that the Pennsylvania Supreme Court's decision was not an unreasonable application of, or contrary to, U.S. Supreme Court precedent.[20]

In his first subclaim, Petitioner maintains that he is entitled to habeas relief because the prosecutor improperly implied that Danny Freeman, an alleged accomplice of Petitioner's, was convicted, when in fact a jury had found Freeman not guilty. We hold that the Pennsylvania Supreme Court's denial of relief to Petitioner on this subclaim does not violate the strict standard of the AEDPA, and therefore we deny relief for this claim.

In his closing argument, the prosecutor stated:

> You took an oath, ladies and gentlemen of the jury, to decide this case based on this evidence presented from that witness stand. You didn't hear anything about Danny Freeman's case other than from the defendant and the defendant's wife. Take that testimony. Take it as you take the rest of the things that came out of both their mouths. Let the defendant' wife, not recalling anything, that the detective said last week, but yet she can tell you in detail what the detective said on the phone this week. Take that testimony from the defendant

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[20] We further hold that as to these three subclaims, the Pennsylvania Supreme Court correctly applied *Greer*; that is, we would reach the same conclusion were we to exercise plenary review after a showing of cause and prejudice or fundamental miscarriage of justice. Therefore, because we find these claims to be without merit, we need not decide whether the Pennsylvania Supreme Court was correct in deeming such claims to be waived.

> and put it right next to everything else he told you. See if it has the ring of truth to it. You don't know what happened to Danny Freeman, and I can't tell you. The law won't let me. If you base your verdict in this case, one way or the other, on what you think happened to Danny Freeman after never having the opportunity to hear the case against Danny Freeman, after not knowing what the verdict is against Danny Freeman, you're going to violate your oaths. And if you ever do find out, you might be surprised of what the verdict was.

(N.T. 5/21/86 at 48.)

Petitioner argues that this subclaim should be considered under a different standard than that of *Greer*. Petitioner contends that the prosecutor's statements were the equivalent of false testimony and, citing *United States v. Agurs*, 427 U.S. 97 (1976), argues that the conduct should be examined under a stricter standard than that of Greer. Indeed, Petitioner seems to advocate overturning Petitioner's conviction for Fourteenth Amendment violations regardless of the substantive effect of the prosecutor's statement on the trial.

Petitioner is incorrect. The prosecutor's statements, made in closing arguments, are not evidence and clearly fall under a different standard than that applied in *Agurs* to false testimony knowingly submitted to the court.[21] The claim, along with the other three, should be examined as one of

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[21] At trial, Judge Sabo specifically instructed the jury that, "the speeches of counsel are not part of the evidence and you should not consider them as such." (N.T. 5/21/86 at 105.)

general prosecutorial misconduct, in which we must place the alleged error in the context of the trial as a whole, and determine if the error was sufficient to cause the denial of due process. *Greer*, 483 U.S. at 765.

The Pennsylvania Supreme Court dismissed Petitioner's first subclaim, simply noting, "We find nothing prejudicial about these remarks." Under the AEDPA, we must defer to this holding, unless we find it to be contrary to, or an unreasonable application of clearly established law. Petitioner has not convinced us that the ruling was contrary to federal law, as his *Agurs* argument is untenable. While unclear, it is certainly possible that the Court viewed the prosecutor's argument, and particularly his use of the word "surprise" as a benign statement meant to reinforce to the jury its obligation to not consider the Freeman verdict. We cannot say that this interpretation is unreasonable. Thus the Pennsylvania Supreme Court's decision did not violate the strict standard of the AEDPA, and we deny relief for this subclaim.[22]

In his second subclaim, Petitioner maintains that the prosecutor improperly stated his personal belief that petitioner was guilty, thus denying Petitioner his right to due process and a fair trial. The Pennsylvania Supreme Court's denial of relief to Petitioner on this subclaim was not contrary to, or an unreasonable application of federal law, and therefore we deny relief for this claim.

The Petitioner specifically objects to the prosecutor's statement analyzing a possible risk to Shirley Baker's life because she gave testimony against the Petitioner, "For

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[22] We would also find the claim to be meritless under the *Greer* standard, so Petitioner would be unable to overcome his procedural default of the substantive claim.

coming in here and testifying against the guys that did it, what do you think they would like to do to her?" (N.T. 5/21/86 at 59.) The Petitioner objects to the prosecutor's characterization that he was one of "the guys that did it," and maintains it deprived him of his rights to due process and a fair trial by prejudicing the jury.

The Pennsylvania Supreme Court dismissed this claim, examining the prosecutor's statement in the context of his larger argument about the differing motives behind the testimony of Shirley Baker and Petitioner.[23] The court held that within the context of this argument, the prosecutor's statement was allowable because the defense had previously questioned Baker's motives for testifying. While this Court might not have adopted this interpretation, we cannot say that it is unreasonable or contrary to clearly established federal law, and we thus deny Petitioner's claim for relief under the AEDPA.

In this subclaim Petitioner objects to the prosecutor's specific characterization of him as one of "the guys that did it." The Pennsylvania Supreme Court, rather than addressing this issue directly, examined the claim in the context of the prosecutor's entire analysis of the varying motives for testifying. We could examine this statement apart from the prosecutor's overall argument contrasting the varying motivations of each witnesses. Using this analysis, we could find that the prosecutor's statement was in error, but even if this were the case, this error did not so infect the trial as to deny the

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[23] The Court addressed both Subclaims 2 and 3 at once, "The prosecutor did nothing more than invite the jury to consider Appellant's motives for testifying untruthfully and to contrast them with Baker's motives for her testimony." *Commonwealth v. Holloway*, 739 A.2d 1039, 1045 (Pa. 1999).

defendant a fair trial. *See Greer*, 483 U.S. at 765. Therefore, Petitioner would not be able to overcome his procedural default, because the substantive claim is without merit.

In his third subclaim, Petitioner maintains that the prosecutor improperly implied that Petitioner was lying, and thus deprived Petitioner of a fair trial and due process. We hold that the Pennsylvania Supreme Court's denial of relief to Petitioner on this subclaim does not violate this strict standard, and therefore we also deny relief for this claim.

Petitioner objects to the prosecutor's questioning of Petitioner's motives for testifying in his own defense during closing arguments. The prosecutor stated:

> [The] defendant comes in here with his witnesses and he has a motive. This is a capital case, and he knows it. He's on trial . . . [h]e's on trial for his life. What in the world could be a stronger motivation to lie? What in the world would be a stronger motivation to bring in other people to lie for you?

N.T. 5/21/86 at 58-59.

Petitioner argues, citing *Caldwell v. Russell*, 181 F.3d 731 (6th Cir. 1999), and *United States v. Rodrigues*, 159 F.3d 439 (9th Cir. 1998), among others, that the prosecutorial attacks on the integrity and credibility of the defense are error sufficient to overturn conviction. Under the AEDPA and *Tyler v. Cain*, 121 S.Ct. 2478 (2001), we are required to apply federal law made retroactive to collateral review by the Supreme Court of the United States, not the Circuit Courts. Thus, Petitioner's argument simply cannot be persuasive under the strict standards required by the AEDPA, and relief

can be denied for this reason alone. Additionally, it is important to note that Petitioner misinterprets and misapplies the cases he does cite.[24]

Rather than being an attack of any sort, it is clear that the prosecutor's statement in this instance was a response to earlier argument by defense counsel, questioning Shirley Baker's motive for testifying. (N.T. 5/21/86 at 25-26.) The idea of "fair response," which allows a party to respond to statements made by opposing counsel, is well-established federal law. *United States v. Robinson*, 485 U.S. 25, 32 (1988). Under this standard, it is clear that the prosecutor's statement was not error.

The Pennsylvania Supreme Court addressed this issue during Petitioner's PCRA appeal, holding that "the prosecutor did nothing more than invite the jury to consider Appellant's motives for testifying untruthfully." *Holloway II*, 739 A.2d at 1045. The Pennsylvania Supreme Court's ruling was not contrary to federal law, as our own search has revealed no Supreme Court case controlling this issue and Petitioner has cited no Supreme Court precedent that requires a contrary holding by this Court. We also conclude that the Pennsylvania Supreme Court's decision did not involve an unreasonable application of clearly established federal law, as the idea of "fair response" is well established. Accordingly, we deny Petitioner relief on this subclaim.

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[24] In *Caldwell*, the court rejected a claim of prosecutorial misconduct arising from the prosecutor's speculation that the defendant gave untruthful testimony because his speculation was supported by other evidence. In *Rodrigues*, the U.S. Attorney attacked the integrity of defense counsel, claiming he had deceived the jury from the start of the trial regarding the nature of the charges.

Petitioner also maintains that the prosecutor's comment improperly injected the question of the possible penalty into the jury's guilt-phase deliberations, citing *Zant v. Stephens*, 462 U.S. 862 (1983). The Petitioner's argument is not convincing. *Zant* merely stands for the proposition that information necessary for penalty-phase sentencing might be prejudicial during guilt-phase deliberations, and thus requires a bifurcated trial. In this case, no information was disclosed in the guilt phase which should have been reserved for the penalty phase, and *Zant* is not applicable. The jury knew that the Petitioner was charged with a capital crime, having been so instructed during the jury selection. The prosecutor's statement was not in error, and thus could not have had a prejudicial effect on the trial, nor deprived Petitioner of his due process rights. We therefore deny Petitioner's claim because it is without merit.

c. Subclaim IV--Review On The Merits Under The AEDPA

In his fourth subclaim, Petitioner argues that the prosecutor improperly stated that the witness Shirley Baker feared for her life, and specifically was afraid of retribution from Petitioner. Petitioner contends that there was no evidence in the record to support such assertions, and that the statement improperly prejudiced the jury, depriving him of his right to due process. This subclaim was decided on direct appeal to the Pennsylvania Supreme Court and we therefore review the decision subject to § 2254(d) of the AEDPA. We find that the Pennsylvania Supreme Court's denial of relief to Petitioner on this subclaim does not violate the strict standard of the AEDPA, and therefore we deny relief for this claim.

During his closing argument, while attempting to contrast Shirley Baker's motive for testifying with that of Petitioner, the prosecutor stated:

> [Shirley Baker is] testifying at peril of losing her life . . . She knows what goes on in the street, and she knows what happened to her. I mean look, for messing up money, Rickey gets strangled twice, and shot in the head, twice. For coming in here and testifying in a capital murder case against the guys that did it, what do you think they would like to do to her . . . What do you think Nasir would like to do to her?

(N.T. 5/21/86 at 59-60.) Petitioner argues that these statements deprived him of a fair trial, by referencing matters outside of evidence. Petitioner also contends that these statements rendered his death sentence fundamentally unfair, because the jury was prejudiced by being led to believe Petitioner posed a future risk to Baker.

The Pennsylvania Supreme Court denied this claim, after hearing it on direct appeal, ruling:

> Generally comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. Clearly the comments here did not rise to such a level. Furthermore they were logical and proper inferences drawn from the surrounding

> facts. Most obvious was the fact that the victim had been eliminated for a mere shortage in receipts. That one might fear like revenge for the even worse betrayal of aiding the police, the inferences were in the ambit of fair comment.

Holloway I, 572 A.2d at 692-93 (citations omitted).

In reviewing Petitioner's claim, we are bound by the AEDPA. Petitioner cites no controlling cases that lead us to believe the decision of the Pennsylvania Supreme Court was contrary to federal law. Likewise, there is no indication that the decision was unreasonable, as the United States Supreme Court defines it.[25] Under the strict standards of the AEDPA we cannot say that the decision of the Pennsylvania Supreme Court is contrary to or an unreasonable application of federal law, and thus deny relief on this claim.[26]

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[25] We reiterate that the AEDPA's requirement that a state court decision be reasonable does not mandate that such a decision be correct. *See Williams v. Taylor*, 529 U.S. 362, 410 (2000) ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.") (emphasis in original). As a result, we do not mean to imply by our ruling here that we consider the state court decisions to be either accurate or preferred applications of *Greer*. We merely find that those courts acted reasonably, i.e. that the outcomes arrived at were not unjustifiable under existing Supreme Court precedent.

[26] Our denial of relief is not an endorsement of the prosecutor's statements. The prosecutor's comments are not excusable. His summation suggested to the jury that Petitioner was a future threat to Shirley Baker, although there was no evidence that validated his claim. His conduct could have had an impact on the

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3. Claim III--Racial Discrimination In Jury Selection

Petitioner claims that he is entitled to a new trial because during jury selection the Commonwealth exercised its peremptory strikes in a racially discriminatory manner in order to exclude African-Americans from his jury in

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(Continued)

jury's later penalty-phase deliberations, deliberations in which the jury ultimately chose to apply the death penalty.

> In 1934, Justice Sutherland famously set a high standard for prosecutorial conduct: The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1934). We believe that the prosecutor's statement regarding Shirley Baker's fears was of the very sort that Justice Sutherland sought to discourage. Nevertheless, we are constrained by the Pennsylvania Supreme Court's decision and the AEDPA, and must deny relief on this claim.

violation of the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, as articulated by *Batson v. Kentucky*, 476 U.S. 79 (1986). Petitioner claims that the Commonwealth had no race-neutral reasons for striking these African-Americans and that any race-neutral reasons proffered for the exclusion of such potential jurors are pretextual. Further, Petitioner claims that a "recently released" Philadelphia District Attorney's Office ("DA's Office") training video, Jury Selection with Jack McMahon, produced approximately one year after Petitioner's trial, and a recent study of the DA's Office over a seventeen-year period including this case, David C. Baldus, et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 (2001) (hereinafter "Baldus study" or "Baldus article"), as well as other evidence, show that the Philadelphia DA's Office systematically discriminated against African-Americans during jury selection in violation of *Swain v. Alabama*, 380 U.S. 202 (1964).[27] Petitioner alleges that all prior counsel were

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[27] Petitioner characterizes the transcript as "recently released." However, neither the transcript nor the Baldus data are new evidence. Petitioner submitted the transcript of the McMahon videotape as an appendix to his brief to the Pennsylvania Supreme Court on PCRA appeal. (PCRA Br. Pa. S.Ct., App. 2.) He also cited to a limited amount of data on the strike rates of African-Americans and non-African-Americans by prosecutors during the ten-year period in which Petitioner's case was tried. (PCRA Br. Pa. S.Ct. at 25-26.) Preliminary results from this earlier Baldus analysis was due to be published at least six months after the brief was submitted. Petitioner did not submit a draft of the article, but rather included as an appendix another article that cited to the not-yet-published preliminary Baldus study, but focused primarily on the races of defendants and victims. (PCRA

(Continued)

ineffective in either failing to raise these claims or failing to properly raise these claims.

Our country has, unfortunately, had a long and ignoble history of both private and official racial discrimination. Racial discrimination by state actors, once condoned by our laws, is now proscribed; yet we must be ever vigilant to recognize and remedy any racial discrimination by state actors that still occurs. Only through such vigilance can we hope to prevent racially discriminatory state action in the future, and ensure that our citizens will be accorded equal justice under law.

The history of racial discrimination in jury selection has mirrored the pattern evident in other areas of civil life. African-Americans were once barred by law from serving on juries. Even after the Supreme Court held that an African-American defendant was denied Equal Protection when members of his race were purposefully excluded from his jury, *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 310 (1880), and recognized that such exclusion was likewise a denial of the potential juror's right to Equal Protection, *id.* at 308, state actors often unofficially continued to prevent African-Americans from serving on juries because of their race. The Supreme Court has long recognized that when persons are thus denied the opportunity to participate in the administration of the law, the harm extends not only to the potential juror and the defendant, but also to the entire community, because public confidence in the fairness of our judicial system is undermined. *See Batson*, 476 U.S. at 87

(Continued)

Br. Pa. S.Ct., App. 3: Death Penalty Information Center, *The Death Penalty in Black & White: Who Lives, Who Dies, Who Decides*, at 23 (June 1998).)

(citing *Ballard v. United States*, 329 U.S. 187, 195 (1946)). Thus, in *Strauder*, the Court began its long effort to "eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." *Batson*, 476 U.S. at 85. Eventually, in *Swain v. Alabama*, 380 U.S. 202 (1964), the Court recognized that racial discrimination in the exercise of peremptory challenges could also be a denial of Equal Protection, but it required a showing of pervasive racial discrimination by prosecutors in the jurisdiction over a long period of time. Finally, in *Batson v. Kentucky*, the Court held that racial discrimination in the exercise of peremptory challenges in the defendant's own trial, without requiring proof of a history of such discrimination, was a denial of both the defendant's and the potential jurors' rights to Equal Protection of Law under the Fourteenth Amendment. 476 U.S. 79 (1986).

We are concerned by the evidence of possible racial discrimination in the exercise of peremptory challenges by both the Commonwealth and defense counsel at Petitioner's trial. Such conduct by either party cannot be condoned, but we cannot excuse discrimination by the Commonwealth on the ground that defense counsel also discriminated. All potential jurors have a right not to be excluded on the basis of their race, and a defendant also has a right to a jury from which members of his race were not purposefully excluded on account of their race. We cannot, however, grant relief to the Petitioner on this basis. We are constrained by the procedural posture of the case, the acts and omissions of Petitioner's prior counsel, and the provisions of Section 104 of the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, from both reaching the merits of this claim and from granting relief based on our review of the decision of the Pennsylvania Supreme Court on this issue.

a. Record Of Voir Dire

During voir dire, after ADA Drew R. Barth's peremptory challenge of a Black prospective juror, Brenda Forrest, Petitioner's trial counsel objected that "I believe the District Attorney has now used all his challenges on black jurors. I believe he has developed a pattern of striking them." (N.T. 5/15/1986, at 129.) A prospective juror was entering the courtroom, so the trial judge, Hon. Albert F. Sabo, deferred discussion of the issue. *Id.* After several other potential jurors had been stricken by agreement or for cause, trial counsel again asserted that the ADA had developed a pattern of striking only Black prospective jurors, and he asked for a mistrial. *Id.* at 141-42. In response, Judge Sabo gave the ADA an opportunity to explain his actions by asking: "Does the Commonwealth have anything to say at this time?" ADA Barth responded by confirming that nine jurors had been selected thus far, two of whom were Black. *Id.* at 142. He also asserted that he had not used his peremptory challenges *exclusively* against Blacks, but had also exercised one of his peremptory challenges to strike a white woman. *Id.* Judge Sabo also noted that the defense also struck a black woman, "juror number eight on yesterday's list." *Id.* Defense counsel noted that she had one son who was recently killed and another who was convicted of [either manslaughter or murder.] *Id.* at 142-43. There was some discussion about whether this son was convicted of manslaughter or murder, because the juror said that he was in jail for life. There was little discussion about whether the ADA was striking African-American venirepersons because of their race. Judge Sabo ended by saying "I'm talking about the one son that was in there. You also knocked off a potential black juror, but the record will speak for itself. All right, gentlemen." *Id.* at 143-44.

An examination of the voir dire sheet contained in the state court record indicates that at this point in the trial, after venireperson Frances Nace had been stricken for cause, the ADA had exercised eight peremptory challenges. Therefore a fair reading of the record indicates that the ADA admitted to having stricken seven African-American potential jurors. At this point of voir dire, defense counsel had exercised fourteen peremptory challenges. Of these fourteen potential jurors, eight had been accepted by the Commonwealth before being peremptorily stricken by defense counsel. The African-American potential juror stricken by defense counsel, "juror number eight," was stricken when it was defense's turn to first question the venireperson, therefore this person was not "acceptable to the Commonwealth but stricken by the defense."[28] *Commonwealth v. Holloway* (*Holloway II*), 739 A.2d 1039, 1045 (Pa. 1999). The notes of voir dire and the voir dire sheet therefore show that at this point during voir dire, none of the venirepersons accepted by the Commonwealth but then stricken by the defense were African-Americans.

Defense counsel exercised four more peremptory strikes; of these potential jurors, only one had first been accepted by the Commonwealth. The notes of voir dire do not reflect the race of this person, Elizabeth A. Dooley (N.T. 5/15/1986, at 186-197). The first of these four, Peter J.

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[28] Pennsylvania requires that defendants or petitioners alleging a *Batson* violation make a record "identifying the race of venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the final jury selected." *Holloway II*, 739 A.2d at 1045 (citing *Commonwealth v. Bronshtein*, 691 A.2d 907 (1997) and *Commonwealth v. Spence*, 627 A.2d 1176 (1993)).

Agresti, was identified for the record as a white person by the prosecutor after defense counsel exercised his peremptory challenge. (N.T. 5/15/1986, at 155.)

The Commonwealth exercised four more peremptory strikes, against Starlett J. Sandoval (N.T. 5/15/1986, at 144-50), Robert Keel, Jr. (N.T. 5/15/1986, at 169-71), John W. Hackley, Sr. (N.T. 5/16/1986, at 28-32), and Elouise M. Baldi (N.T. 5/16/1986, at 33-37). After the Commonwealth struck Ms. Sandoval, defense counsel noted for the record, without formally objecting, that she was Black. (N.T. 5/15/1986, at 50.) His assertion is uncontroverted in the record. When the Commonwealth struck Mr. Keel, defense counsel again noted for the record, without objecting, that the venireperson was Black. (N.T. 5/15/1986, at 171.) The prosecutor then noted for the record that the venireperson was a "single, young, unemployed, on welfare, black male." *Id.* After the Commonwealth struck Mr. Hackley, defense counsel noted without objecting that the venireperson was Black. The ADA then noted for the record that the venireperson was a Black male approximately the same age as the defendant. (N.T. 5/16/1986, at 32.) After the Commonwealth exercised its final peremptory challenge, against Ms. Baldi, defense counsel noted that she was Black. (N.T. 5/16/1986, at 37.) The prosecutor also offered reasons for his striking her: she was "a Black female, whose brother-in-law was convicted of narcotics charges. Narcotics would play a central role in the testimony of this case." *Id.* at 37-38.

The record does not reflect the races of the last three jurors selected–Sydney Bergman, Nicholas J. McGinty, and Brenda J. Ward.

A close reading of the record reveals that the following summary information was therefore available to the

Pennsylvania Supreme Court on PCRA appeal. the Commonwealth exercised peremptory challenges against twelve venirepersons, eleven of whom were Black and one of whom was White; nine potential jurors were first accepted by the Commonwealth before being stricken by the defense, but at the most only one of these persons, Elizabeth Dooley, could have been an African-American; of the first nine jurors chosen, two were Black and seven were White; the races of the final three jurors was unknown. Petitioner also asserted on PCRA appeal that in addition to examining the trial record, a comparison of juror names with voter registration records shows that except for the one white woman that the ADA admitted to having stricken, all other venirepersons peremptorily stricken by the Commonwealth were African-Americans, and that all except two jurors were White; however, he presented no actual evidence to the PCRA trial court or the Pennsylvania Supreme Court on PCRA appeal.

b. State Court Proceedings

Trial counsel moved for a mistrial based on the pattern of strikes by the prosecutor, which would have preserved the claims based thereon for appeal. Nevertheless, no such claim was raised in Petitioner's counseled direct appeal brief.[29] Petitioner did raise both the *Batson* claim as to

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[29] Petitioner alleges that he raised the *Batson* claim on direct appeal in a pro se filing that he filed some nine months after his counsel filed a brief on his behalf. The Pennsylvania Supreme Court deferred the decision of whether it would accept and consider the filing until oral argument on the counseled brief. There is no evidence of whether the court considered it or not; we only know that none of the issues raised therein were addressed by the Pennsylvania Supreme Court in its opinion affirming the judgment

(Continued)

discrimination in the selection of his jury, and the *Swain* claim as to systematic discrimination in the selection of juries in Philadelphia County, to the Pennsylvania Supreme Court on PCRA appeal. Petitioner also alleged ineffectiveness of all prior counsel in his PCRA appeal to the Pennsylvania Supreme Court. Because Petitioner failed to raise either the *Batson* or *Swain* claim on direct appeal, the Pennsylvania Supreme Court deemed them to be waived, 42 Pa. Cons. Stat § 9544(b), and held that it was barred from hearing them, *id.* § 9543(a)(3). *See Commonwealth v. Holloway* (*Holloway II*), 739 A.2d 1039, 1044 (Pa. 1999). Petitioner's allegation of ineffectiveness of all prior counsel, however, preserved the underlying *Batson* and *Swain* claims and overcame the waiver, inasmuch as it allowed the court to consider the Equal Protection claims as an underlying bases for the ineffectiveness claim.[30] *See id.*; § 9543(a)(4). The court

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of sentence, nor did the court even mention the filing or its contents. *Holloway I*, 572 A.2d 687 (1990). *See* discussion in n.38, *infra*.

[30] In its opinion, the Pennsylvania Supreme Court stated that because Petitioner had failed to raise the Equal Protection claim on direct appeal and to the PCRA trial court, it was deemed waived; the court considered the claim only because ineffectiveness of PCRA trial court counsel was alleged. *See Holloway II*, 739 A.2d 1039, 1044 (Pa. 1999). An examination of the record, however, shows that the *Batson* claim was raised to the PCRA trial court in the Supplemental Amended Petition under Post Conviction Relief Act and the Memorandum of Law in support thereof, both filed August 15, 1994, and in a Supplemental Memorandum of Law in Support of Petitions under Post Conviction Relief Act, filed April 30, 1997. In his opinion ruling on the PCRA petition and amendments and supplements thereto, Judge

(Continued)

expressly mentioned *Batson* and relevant state interpretations of *Batson*, but not *Swain*, in its opinion. *Id.* at 1045. Further, in deciding the ineffectiveness claim, the court found that it was unable to determine whether the *Batson* claim had arguable merit. It found that Petitioner had failed to make a record sufficient to consider whether the trial court had *improperly* failed to find a prima facie case, because he failed to provide specific evidence required by the Pennsylvania Supreme Court to determine whether an intent by the prosecutor to racially discriminate could be inferred. The court did not consider whether the reasons proffered by the prosecutor for his striking two African-Americans were pretextual and entitled Petitioner to a new trial.

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Sabo found that many claims, including that of racial bias in jury selection, did not even merit discussion in his denying the petition. His only statement as to these claims was that "[t]he majority of these claims have not been discussed because no substantial evidence or rational law has been presented which would warrant further review. Mr. Holloway has had the benefit of three different counsels, all of whom had ample opportunity to research and argue the legal issues existing in this case. None of the attorneys have shown error in his conviction or sentence." *Commonwealth v. Holloway*, No. 1305, June Term, 1985, slip op. at 15 (Phila. Ct. Comm. Pl., July 16, 1997). The *Swain* claim of systematic discrimination in jury selection was not raised to the PCRA trial court. We therefore find that the *Batson* claim was fairly presented to every level of the state courts and is thus exhausted. *O'Sullivan*, 526 U.S. at 845; *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). As will be explained *infra*, the issue of whether the *Swain* claim was exhausted is moot beause *Batson* subsumed *Swain*.

c. Legal Background

A defendant has a "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. 79, 85-86 (1986) (citing *Martin v. Texas*, 200 U.S. 316, 321 (1906)). In order to establish a race-based Equal Protection violation in the selection of his jury, a defendant must show that the prosecutor challenged members of a racial group because of their race "or on the assumption that black jurors as a group will be unable partially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 89. Previously, in *Swain v. Alabama*, the Court refused to "hold that the striking of Negroes in a particular case is a denial of the equal protection of the laws." 380 U.S. 202, 221 (1964). In order to "preserve the peremptory nature of the prosecutor's challenge," the Court declined to examine the actions of the prosecutor in the trial at issue, instead "relying on a presumption that he properly exercised the State's challenges." *Batson*, 476 U.S. at 91 (citing *Swain* at 221-22).

Swain instead prohibited systematic discrimination against African-Americans such that in case after case they were peremptorily stricken from venires, so as to raise an inference that the prosecutors excluded African-Americans from the defendant's jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny them "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Swain*, 380 U.S. at 224. To show an intent to discriminate such that the peremptory challenge system was "being perverted" in the proscribed manner under *Swain*, the defendant must show a pervasive systematic discrimination

against African-Americans.[31] *Swain*, 380 U.S. 202, 223-24. Such a showing was required as a "predicate for attacking the peremptory strikes as they were used in [Defendant's] case." *Swain*, 380 U.S. at 226.

Batson overruled *Swain*, removing the requirement of a showing of systematic discrimination in order to prove an Equal Protection violation. *Batson* also overruled *Swain* to the extent that it had it foreclosed objections to the discriminatory use of peremptories in the course of defendant's trial. *Batson*, 476 U.S. at 90-93. *Batson* "held that a defendant can raise an equal protection challenge to the use of peremptories

[31] The Court appeared to create a high hurdle for defendants to overcome in proving an Equal Protection violation based on such systematic discrimination:

> [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356. In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome.

Swain, 380 U.S. at 223-24.

at his own trial by showing that the prosecutor used them for the purpose of excluding members of the defendant's race." *Powers v. Ohio*, 499 U.S. 400, 405 (1991) (citing *Batson*, 476 U.S. at 96).

The first step in making a *Batson* claim is to establish a prima facie case of purposeful discrimination in the selection of the jury. To do so, the defendant must first show "that he is a member of a cognizable racial group" and that the prosecutor has peremptorily stricken members of the defendant's racial group.[32] *Batson*, 476 U.S. at 96. Second, the defendant may rely on the fact that peremptory challenges will unfortunately permit "'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)). "Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the [potential jurors] from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury . . . raises the necessary inference of purposeful discrimination." *Id.* As examples of relevant circumstances that may be examined to infer discriminatory intent, the Court pointed to a "'pattern' of strikes against black jurors included in the particular venire" and "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." *Id.* at 97.

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[32] The Supreme Court has since held that under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race. *Powers v. Ohio*, 499 U.S. 400 (1991). Here, however, Petitioner is African-American and objects to the exclusion of other African-Americans from his jury.

At the next step, after "the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. It is insufficient and impermissible for the prosecutor to merely state that "he challenged jurors of the defendant's race on the assumption--or his intuitive judgment--that they would be partial to the defendant because of their shared race." *Id.* Nor may the prosecutor simply deny that he had a discriminatory motive or affirm his good faith in making individual selections. *Id.* at 98. Instead, the prosecutor "must articulate a neutral explanation related to the particular case to be tried." *Id.* Such an explanation need not be "persuasive, or even plausible," *Purkett v. Elem*, 514 U.S. 765, 768 (1995); the explanation merely must be facially valid, with no inherent discriminatory intent. *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion).

At step three, the trial court must "determine if the defendant has established purposeful discrimination." *Batson*, at 476 U.S. at 98. Such determination requires the trial court to examine the credibility of the prosecutor and decide whether the proffered explanations are pretextual.

The *Batson* Court explicitly declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99.

d. *Swain* Claim

Although the Pennsylvania Supreme Court never expressly mentioned *Swain* in its decision on the claim of ineffective assistance of counsel for failing to raise the claim of racial discrimination in jury selection, we believe that it did consider the *Swain* claim in its adjudication of the ineffective assistance of counsel claim. If we are correct, we

must review the ineffectiveness claim raised by Petitioner[33] under the AEDPA's standard of review, which bars us from granting relief unless the Pennsylvania Supreme Court's decision was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). Further, because PCRA's procedural rules act as an independent and adequate state ground barring us from examining the underlying *Swain* claim on the merits, we may only do so if Petitioner can show cause and prejudice to overcome the procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). If we are incorrect, however, that the court considered the *Swain* claim as an underlying basis for the ineffectiveness claim, we would examine the *Swain* claim de novo, because it was fairly presented to the Pennsylvania Supreme Court, not adjudicated on the merits, and there was no ruling by the Pennsylvania Supreme Court that it was procedurally barred from considering the claim. *See, e.g., Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001).

It was not necessary for the Pennsylvania Supreme Court to mention expressly *Swain* or the evidence of systematic discrimination against African-American jurors that was proffered, i.e. the transcript of the McMahon tape or the Baldus study data, and therefore its decision not to do so was not an unreasonable application of, or contrary to, any U.S. Supreme Court precedent. Even though *Swain* required evidence of systematic discrimination, the heart of a jury selection-based Equal Protection claim raised by a defendant was and still is that potential jurors were excluded from the defendant's venire or jury because of their race. Evidence of

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[33] The ineffectiveness claim is itself a claim for habeas relief; it is not an allegation of ineffectiveness to be proven to show cause to excuse a procedural default.

systematic discrimination was only used to show an intent to discriminate in the trial of the defendant; it was not a claim in itself. Under *Swain*, the record in the defendant's case could not be used to conclusively show intent to discriminate, but the defendant was nevertheless required to show that members of his racial group were in fact stricken. *See Ford v. Georgia*, 498 U.S. 411, 420 n.5 (1991) (explaining that reading *Swain* "without the requirement of proving discrimination in the selection of an objecting defendant's own jury" is impermissible). The Court reiterated its views on the differences between *Batson* and *Swain* several years before *Holloway II* was decided. In *Ford v. Georgia*, the Court explained:

> [b]ecause *Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim, it follows that a defendant alleging a violation of equal protection of the law under *Swain* necessarily states an equal protection violation subject to proof under the *Batson* standard of circumstantial evidence as well.

498 U.S. at 420. Because *Swain* simply required more proof than *Batson*, and such excess proof is no longer necessary, it was not unreasonable for the Pennsylvania Supreme Court to focus only on the evidence needed to prove a *Batson* claim, and to ignore the *Swain* claim entirely. In so doing, the court paralleled the analysis of *Ford v. Georgia*; therefore the court's focus on *Batson* was neither contrary to, nor an unreasonable application of, clearly established federal law as articulated by the Supreme Court of the United States on

the subject of Equal Protection violations through racial discrimination in jury selection.[34]

Were we to reach and examine the merits of the *Swain* claim de novo, such as after a finding that the *Swain* claim was fairly presented but not adjudicated on its merits, after a showing of cause and prejudice under *Coleman*, or as a required component in showing ineffective assistance of counsel, we would also deny relief. As in *Swain* itself, the record in the instant case cannot support an inference that the Philadelphia District Attorney, and the Assistant District Attorneys, were bent on striking African-Americans regardless of trial-related considerations. *Swain* at 225-26. Although the Petitioner has proffered evidence that the Philadelphia District Attorney's Office may have used race as a factor in jury selection over a substantial period of time, the evidence does not show overwhelming, pervasive discrimination as required by *Swain*. *See* note 31, *supra*. In fact, to the extent that the transcript of the McMahon tape is indicative of the policy and practice of the Philadelphia DA's Office,

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[34] "The threshold question under AEDPA is whether [Petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (Stevens, J., for the Court). *But see id.* at 412 (O'Connor, J., for the Court) ("'[C]learly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."). We need not decide which of these standards to apply. The discussion in *Ford v. Georgia* of *Batson* and *Swain* is merely dicta, and we are only using it to illuminate the reasonableness of the Pennsylvania Supreme Court's application of *Batson* and its apparent interpretation of *Batson* obviating *Swain*; we are not asserting that the Court in *Ford* determined the relevant clearly established federal law.

see n.68 *infra*, it suggested both that some classes of African-Americans should be avoided, but also that prosecutors considered certain classes of African-Americans to be highly desirable as jurors (PCRA Br. Pa. S.Ct., App. 3 at 56-59), and that African-Americans were being stricken for trial-related reasons. (*Id.* passim.) Similarly, the Baldus data tends to disprove the overwhelming lack of African-Americans serving on juries that *Swain* required.[35] Both the transcript and the study allow an inference that the Philadelphia DA's Office intended to discriminate against African-Americans, but they also lead to an inference that the DA's Office did not intend to discriminate against African-Americans in the way prohibited by *Swain*. Therefore, the burdensome standard of proof required by *Swain* has not been met, and we would deny a *Swain* claim were it properly before us.

e. *Batson* Claim

Petitioner's counsel did not raise the *Batson* claim on direct appeal despite the fact that trial counsel objected during voir dire that the prosecutor appeared to be using his peremptory challenges to remove African-Americans from the venire and moved for a mistrial. PCRA counsel alleged ineffectiveness of direct appeal counsel for failing to raise the

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[35] *Swain* asserts that the fact of no African-American ever serving on a jury in a county over an indefinite, but very long, period of time, "might" be enough to support an inference of improper racial discrimination. Although the Baldus study contains a plethora of data, the Petitioner cites only summary statistics. (Pet. Reply Mem. at 65). However, even this data shows that in 326 capital cases over a seventeen-period, Philadelphia prosecutors accepted 1596 African-Americans as jurors and peremptorily struck 1942 African-American potential jurors.

claim previously. The PCRA bars the Pennsylvania Supreme Court from reviewing claims that could have been brought previously, unless, among other limited exceptions not relevant here, the failure to raise the claim previously was due to ineffective assistance of counsel. *See* Pa. Cons. Stat. §§ 9543(a)(3), 9544(b). The Pennsylvania Supreme Court therefore considered the *Batson* claim not as an independent claim, but only as an issue underlying a claim of ineffective assistance of counsel. *Holloway II*, 739 A.2d at 1044.

In its PCRA opinion, the Pennsylvania Supreme Court first tried to determine whether the Petitioner had shown that the underlying *Batson* claim has merit, because counsel cannot be ineffective for failing to raise a meritless claim. *Strickland*, 466 U.S. at 691; *Commonwealth v. Peterkin*, 649 A.2d 121 (Pa. 1994). The court determined that the Petitioner had provided insufficient evidence to allow it to decide whether his *Batson* claim had merit:

> Appellant has failed to make a record "identifying the race of venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the final jury selected." *Commonwealth v. Bronshtein*, 547 Pa. 460, 691 A.2d 907, *cert. denied*, 522 U.S. 936, 118 S.Ct. 346, 139 L.Ed.2d 269 (1997). "Where an appellant fails to make a record for review of a *Batson* challenge, this Court is unable to consider a claim that the trial court failed to find a prima facie case under *Batson*." *Commonwealth v. Spence*, 534 Pa. 233, 627 A.2d 1176 (1993). Therefore, it is impossible to determine if Appellant's claim has arguable merit.

Holloway II, 739 A.2d at 1045. The court then noted that "Appellant does not even allege that counsel's ineffectiveness with respect to this issue 'so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.' 42 Pa. Cons. Stat. § 9543(a)(2)(ii). Accordingly, no relief is due." *Holloway II*, 739 A.2d at 1045-46.

The Pennsylvania Supreme Court adjudicated the claim of ineffective assistance of prior counsel for failure to raise the *Batson* claim, deciding that all prior counsel were not ineffective.[36] We must apply the AEDPA in reviewing this decision, and in doing so we conclude that the

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[36] There was some confusion at oral argument before us on August 2, 2001, as to which claim the Pennsylvania Supreme Court adjudicated. If its decision were an adjudication of the *Batson* claim, it made a finding that it is impossible to determine whether the *Batson* claim has merit, i.e. that the underlying claim was not proven by the party having the burden of proof. However, for the reasons explained previously, including the court's explicit statement that it would "treat each of the remaining issues [including *Batson*] as a claim for ineffective assistance of counsel," *Holloway II*, 739 A.2d at 1044, we believe that it adjudicated the ineffective assistance of counsel claim, deciding that Petitioner did not "show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. In either event, sufficient grounds are not made out for us to conclude that "the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of" either *Batson* or *Strickland*. 28 U.S.C. § 2254 (d)(1).

adjudication of the ineffectiveness claim[37] did not result in a decision that was contrary to, or involved an unreasonable application of, either *Batson* or *Strickland*. 28 U.S.C. § 2254 (d)(1). Because we have found that PCRA's procedural rules act as an independent and adequate state ground that bars us from examining the *Batson* claim on the merits, we may only do so if Petitioner can show cause for and prejudice from the procedural default that resulted from his failure to present the *Batson* claim on direct appeal. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). We find that, given the state of the law and the record at the time of direct appeal, direct appeal counsel did not act unreasonably in not raising the *Batson* claim, and therefore cause has not been shown. Even if we were incorrect in finding that the PCRA rules are an independent and adequate state bar, and were required to examine the claim on the merits, we would not find a *Batson* violation on the record before us.[38]

[37] The ineffectiveness claim is itself a claim for habeas relief; it is not an allegation of ineffectiveness to be proven to show cause to excuse a procedural default.

[38] We do not consider the *Batson* claim to have been exhausted on direct appeal by virtue of Petitioner's pro se filing of his Application Made Pursuant to PA. R.A.P. 2501(a) To File Pro Se Supplemental Brief on July 31, 1989, some nine months after his counseled direct appeal brief was filed. Petitioner made this argument for the first time at an evidentiary hearing that we granted for the sole and limited purpose of allowing direct appeal counsel to be examined and cross-examined as to his reasons for not raising the *Batson* claim on direct appeal, in order to determine whether cause could be established for the procedural default resulting from his failure to raise the *Batson* claim on direct appeal. Petitioner did not make such an argument in his Petition, Memorandum of Law, or his Reply Brief.

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Neither did PCRA trial level and PCRA appellate counsel argue the issue that Petitioner raised the *Batson* claim on direct appeal by virtue of his pro se filing. They only argued that direct appeal counsel was ineffective for failing to raise the *Batson* claim. We believe that if they had made such an argument, the Pennsylvania Supreme Court could have decided that it should consider the *Batson* claim directly, instead of finding it waived because it was not raised on direct appeal, and only considering it as a claim underlying a claim of ineffectiveness of counsel. Had the court had the benefit of this argument, it could have decided whether the procedural bar it ultimately applied was appropriate. We believe that we are bound by this procedural default. PCRA counsel did not raise this issue that was necessary for the Pennsylvania Supreme Court to examine the *Batson* claim on its merits. We believe that this argument itself must be exhausted in order for us to consider it, because if we were to accept it now, it would entitle Petitioner to de novo review of the *Batson* claim. In other words, the argument and the evidence presented thereon were simply another back door way to for Petitioner to argue that we should consider the *Batson* claim directly. This argument was not exhausted because it was not fairly presented to the Pennsylvania Supreme Court, and because it could not be raised there now, we find it to be procedurally defaulted. *See* Part III. B. 2, *supra*. Such a default cannot be overcome, because there is no constitutional right to counsel in collateral proceedings. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

Under the facts before us there is substantial doubt that a pro se filing by a person represented by counsel was sufficient to file, raise, and exhaust this claim. Even if we were to consider the *Batson* claim to be exhausted by this pro se filing, and find that the Pennsylvania Supreme Court did not adjudicate the claim on direct appeal and erred in stating that the claim was raised for the first time on PCRA appeal, we have examined the claim de novo

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(1) Ineffectiveness Claim

Petitioner argues that he is entitled to a new trial because the Pennsylvania Supreme Court's decision on the ineffectiveness claim resulted in a decision that was contrary to, or involved an unreasonable application of, either *Batson* or *Strickland*, or both. Petitioner argues that the *Spence* rule is contrary to, or unreasonable application of *Batson*, and therefore the Pennsylvania Supreme Court erred (1) in not finding a prima facie *Batson* violation based on the record and Petitioner's examination of voter registration records that purportedly show the races of the potential and chosen jurors; (2) in retroactively applying the Pennsylvania *Spence* rule to him; and (3) in not finding that any violation of the rule was due to ineffective assistance of counsel. He further argues that with respect to the potential jurors for whom the prosecutor offered explanations for his strikes, the issue of a prima facie case is moot, so the *Spence* rule is irrelevant; the Pennsylvania Supreme Court's adjudication was contrary to, or an unreasonable application of, *Batson*, because the court should have considered the reasons given by the prosecutor and determined whether there had been a *Batson* violation.

(a) Validity Of The *Spence* Rule

Pennsylvania's requirement that a defendant objecting to a prosecutor's allegedly discriminatory use of peremptory strikes must identify the race of potential jurors stricken by the Commonwealth, the race of potential jurors acceptable to

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herein in our consideration of whether counsel could have been ineffective for failing to raise it, and have found it to be without merit, even with the expanded record.

the Commonwealth but stricken by the defense, and the racial composition of the final jury selected was first articulated in *Commonwealth v. Spence*, 627 A.2d 1176, 1182-83 (Pa. 1993). By its terms, the *Spence* rule only applies to the record before the appellate court, not before the trial court. *See id.* The Pennsylvania Supreme Court, however, has expanded the rule to require that the defendant make such a complete record before even the trial judge can decide whether there has been a *Batson* violation. In other words, jury selection must be complete before the objection may be ruled upon. *See, e.g.*, *Commonwealth v. Simmons*, 662 A.2d 621, 631 (Pa. 1995). The Petitioner argues that this requirement is fundamentally inconsistent with and therefore contrary to *Batson*, which contemplates that claims of discrimination be contemporaneously raised and resolved. In *Hernandez v. New York*, the U.S. Supreme Court noted that "*Batson* permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." 500 U.S. 352, 358 (1991).

The timing element of the *Spence* rule is not contrary to *Batson*. The Court declined to create specific procedures for a trial court to follow upon defendant's timely objection to the prosecutor's peremptory strikes. *Batson*, 476 U.S. at 99. The Court recognized that a variety of jury selection practices are followed by state and federal trial courts, therefore the Court expressly made "no attempt to instruct these courts how to best implement" *Batson*'s holding. *Id.* at 99 n.24. *Batson* also contemplated allowing the trial court to choose whether to contemporaneously rule on such objections or wait until the end of jury selection, and if the trial judge found that there had indeed been impermissible discrimination, to strike the whole jury and empanel another. *Id.*; *see also Hernandez*, 500 U.S. at 358 (noting that *Batson* permits such contemporaneous rulings, but not stating that

Batson requires them). If the Court would have left the procedural decision to the trial judge, surely it is permissible for a state supreme court to make that decision on behalf of its trial courts.

Neither is the substance of the *Spence* rule an unreasonable application of *Batson*. The evidence required by the rule would show that members of a racial group were in fact stricken by the government, would help to show the totality of the circumstances surrounding jury selection, and are the underlying facts necessary to determine whether a "pattern of strikes" exercised against members of a racial group exists. Both the Supreme Court in *Batson*, 476 U.S. at 97, and the Third Circuit in *United States v. Clemons*, 843 F.2d 741, 748 (3d Cir. 1988), cite such a "pattern of strikes" as an example of the type of evidence that may be used to raise an inference of intent to discriminate to support a prima facie case. Neither case states that either showing such a pattern or supplying the evidence needed to determine whether there is such a pattern is dispositive. These cases merely indicate that such information is relevant. The Third Circuit reiterated this view in *Simmons v. Beyer*, which concisely set forth five general factors for evaluating a prima facie *Batson* claim. 44 F.3d 1160, 1167 (3d Cir. 1995) ("In [*Clemons*] we elaborated on the first step of a *Batson* analysis, listing five factors that are relevant to a prima facie case: (1) the number of racial group members in the panel, (2) the nature of the crime, (3) the race of the defendant and the victim, (4) a pattern of strikes against racial group members, and (5) the prosecution's questions and statements during the voir dire."). Despite the fact that these cases merely suggest examining the evidence that is required by the *Spence* rule, and expressly disavow any binding requirement on trial

courts to examine specific types of evidence,[39] we cannot say that the *Spence* rule is an unreasonable application of *Batson*.[40] All three elements of the rule are individually helpful in determining whether members of a racial group were included in a particular venire and were in fact stricken, and in combination the elements are helpful in determining whether

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[39] We note that, contrary to Petitioner's characterization of it, the *Spence* rule is not a "bright line test" for determining whether a prima facie case has been established. The rule does not speak to how a court will decide once it has this relevant information. Indeed, bright line tests based solely on the pattern of strikes are generally disfavored; such a pattern is merely a highly relevant factor used in inferring intent. *See Clemons*, 843 F.2d at 746 (canvassing cases) ("We find that establishing some magic number or percentage to trigger a *Batson* inquiry would short-circuit the fact-specific determination expressly reserved for trial judges.").

[40] Neither is the substance of the *Spence* rule "contrary to" *Batson*. In *Williams v. Taylor*, the Court explained that the "contrary to" language of § 2254(d)1) "suggests that the state court's decision must be substantially different from the relevant precedent" of the Supreme Court. 529 U.S. 362, 405 (2000). The *Batson* standard is very broad and allows lower courts substantial leeway in setting procedures to be followed in applying its three-step procedure. The *Spence* rule falls within this broad standard and thus cannot be said to be "substantially different" or "diametrically opposed," and hence not "contrary to" *Batson*.

Further, there is nothing to indicate that the Pennsylvania Supreme Court would apply the *Spence* rule blindly in every case, even when there is an abundance of other evidence supporting a prima facie *Batson* case, such as might exist in the case of a racially charged crime, or when the prosecutor's questions during voir dire strongly indicate that race is a major factor. However, such is not the case before us.

the prosecutor had a discriminatory intent in exercising such challenges.

(b) Application Of The *Spence* Rule To Petitioner

The Pennsylvania Supreme Court's application of the *Spence* rule to Petitioner was not impermissibly retroactive. Petitioner cites to *Ford v. Georgia*, 498 U.S. 411 (1991), which held that a Georgia rule first announced by state courts in 1987, under which *Batson* claims were deemed waived unless the asserted violation was contemporaneously objected to at trial, could not be retroactively applied to the petitioner, whose trial was held in 1984. *Ford* is inapposite because the *Spence* rule, as applied to Petitioner, does not require that a *trial* record have been made as to the race of potential and chosen jurors. Rather, it required only that the record before the reviewing court contain such evidence. *Spence*, 627 A.2d at 1182-83; *see also, e.g., Commonwealth v. Simmons*, 662 A.2d 621, 631 (1995) ("[A]ppellant failed to make an adequate record for appeal in that he has done nothing to inform the Court regarding the categories identified in *Spence*."). *Spence* was decided in 1993–after Petitioner's direct appeal was final. The supplements to the PCRA petition that raised the *Batson* issue were filed in 1994 and 1997, but they contained mere allegations of the race of some jurors. Even *Simmons*, which showed that it was both necessary and sufficient for the appellate record to reflect the evidence required under the *Spence* rule, was decided July 19, 1995–the same day that Judge Sabo granted Petitioner's request for a PCRA evidentiary hearing.[41] The hearing,

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[41] The request for an evidentiary hearing was a general one (R. at D-28, Supplemental Amended Petition under PCRA, filed

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however, was not held until February 10, 1997. Therefore PCRA counsel was clearly on notice that the races of the jurors had to be proven, not merely alleged, and that this could be done at a PCRA hearing if it had not been done previously. At the PCRA hearing, however, there was no mention of the *Batson* claim. After introducing new evidence on other claims, Petitioner's counsel rested on the petitions and memoranda that had been filed in the case for his arguments on the various issues. (N.T. PCRA Hrg., 2/10/97 at 11). Judge Sabo asked whether there was anything else to come before him, but counsel failed to mention anything else.

The Pennsylvania Supreme Court's actual application of the *Spence* rule was not unreasonable and comported with due process. The record provides much of the evidence required under the *Spence* rule, but not all of it.[42] To fill in the holes in the record on PCRA appeal, Petitioner asserted

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8/15/94, final page), as was the granting of an evidentiary hearing (R. at D-33). There is no evidence in the record that Petitioner either requested or was denied an evidentiary hearing specifically on the *Batson* claim.

[42] A fair reading of the trial court record, which was explicitly made part of the PCRA record at the PCRA evidentiary hearing, reveals that the prosecutor exercised twelve peremptory challenges: eleven against African-Americans and one against a Caucasian. The record also shows that of the first nine jurors seated, only two are African-Americans. The record does not prove whether the other seven jurors were Caucasian or other races; nor does it prove the race of the remaining three jurors. Finally, the record shows that the defense struck an African-American from the venire, but this person was not first accepted

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that an analysis of voter registration records shows that races of the jurors and potential jurors as required. Petitioner failed to submit copies of such voter registration records to the state courts at any stage of the PCRA process. Petitioner was clearly on notice of the requirement to provide actual evidence because the issue was addressed in the brief to the Pennsylvania Supreme Court on PCRA appeal, with an argument that it not be retroactively applied to Petitioner. The Petitioner did not explain to the PCRA courts or to this Court the absence of such records at the PCRA appeal level, or allege an inability to submit such records to the Pennsylvania Supreme Court; he merely alleged that such records existed and proved the races of the prospective jurors. We cannot fault the Pennsylvania Supreme Court for adhering to the strict terms of its rule that such evidence be provided.[43]

PCRA appellate counsel requested a remand for a hearing to prove the race of the jurors, but the Pennsylvania Supreme Court denied the petition without remanding, and, indeed, without mentioning the request for a remand in its opinion. We cannot say that its refusal to remand was unreasonable. As just discussed, initial PCRA counsel was clearly on notice of the need to develop the record and had

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by the prosecutor; at the most one only one other juror could have been African-American and accepted by the prosecutor but then stricken by the defense.

[43] The key evidence missing was the race of the last three jurors chosen. The Pennsylvania Supreme Court's conclusion as to whether a prima facie case existed could have reasonably turned on this information. If, for example, evidence had shown that all of these jurors were African-American, it is unlikely that the court would have concluded that the pattern of strikes raised an inference of racial discrimination.

considerable opportunity to do so. Further, Petitioner saw fit to submit, for the first time on PCRA appeal, other evidence supporting his claim, such as the transcript of the McMahon tape and the article on racial discrimination in capital punishment. Voter registration records could have been likewise submitted. There is nothing to indicate that the court would not have considered the voter registration records to be sufficient evidence of the race of the jurors as required by the *Spence* rule.[44]

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[44] There does not seem to be any good reason for PCRA trial or appellate counsel to have failed to provide the voter registration records, or, indeed, to otherwise have failed to provide the evidence required by the *Spence* rule. As previously explained, counsel at both levels were clearly on notice that such a record must be developed in order to state a prima facie *Batson* claim in appellate courts, even if such a record were not developed at trial. We may not review the decision of the Pennsylvania Supreme Court as to the reasonableness of counsel's conduct as a basis for granting the writ, however, because ineffectiveness of PCRA counsel is simply not a claim cognizable by this Court. *See* 28 U.S.C. § 2254(i); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

We may, however, review the implicit decision of the Pennsylvania Supreme Court that trial and direct appeal counsel were not ineffective for failing to comply with the *Spence* rule. We find that this decision was a reasonable application of *Strickland*. The *Spence* rule was not yet in existence, and counsel is not required to be prescient. *See, e.g., Sistrunk v. Vaughn*, 96 F.3d 666, 671 (3d Cir. 1997) (holding that direct appeal counsel could not have been ineffective for failing to raise a *Batson*-type claim before *Batson* had been decided by the Supreme Court); *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989) ("There is no general duty on the part of defense counsel to anticipate changes in the law." Because trial and direct appeal counsel

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(c) Pennsylvania Supreme Court's Refusal To Look At Strikes For Which Explanations Were Given

The Pennsylvania Supreme Court refused to examine the reasons given by the prosecutor for striking African-Americans despite the fact that the trial judge had never made a finding as to the existence of a prima facie case, ending its examination of the issue because the defendant failed to provide the evidence needed to determine whether a prima facie case existed. We cannot say that this interpretation of *Batson*'s burden-shifting provision was unreasonable.

Under some circumstances, when a prosecutor has offered reasons for his strikes without being required to do so by the trial judge, the reviewing court will overlook the Petitioner's failure to show a prima facie case, or the trial judge's failure to rule on the issue, as moot. *See Hernandez v. New York*, 500 U.S. 352, 358-359 (1991) (plurality opinion). The Court has thus far only held that such is the case when "the trial court has ruled on the ultimate question of intentional discrimination." *Id.* at 359. The Third Circuit has modified and expanded this principle. *See United States v. Uwaezhoke*, 995 F.2d 388, 392 (3d Cir.1993), *cert. denied*, 510 U.S. 1091 (1994) ("If the government is found at any subsequent stage of the case either to have tendered an explanation that is not race neutral or to have acted with racial animus, the conviction must be overturned without regard to whether the defendant established a prima facie case."). *See also*

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could not have known of the requirements of the *Spence* rule, their failure to comply with it was not unreasonable, and thus the court's decision was reasonable.

Johnson v. Love, 40 F.3d 658, 665 (3d Cir. 1994) ("Where the record as a whole as ultimately developed permits a reasonable argument that the judgment is so tainted, the issue of taint must be resolved; it cannot be avoided by a finding that the defendant failed to present a prima facie case."); *United States v. Clemmons*, 892 F.2d 1153, 1156 (3d Cir. 1989). The Pennsylvania Supreme Court is not bound in any case by the holdings of the Third Circuit. Neither does the Pennsylvania Supreme Court's decision run afoul of *Hernandez*: the trial court never ruled on the ultimate question of intentional discrimination, *Hernandez*, 500 U.S. at 358-59; and *Hernandez* was decided after Petitioner's direct appeal became final so Petitioner would not have gotten the benefit of it, *see Williams v. Taylor*, 529 U.S. 362, 390, 412 (2000), and it was also only a plurality opinion. The court in Holloway II merely adhered to the strict terms of *Batson*, and thus cannot be said to have applied it unreasonably.

(d) Conclusion

The Pennsylvania Supreme Court, on PCRA appeal, decided that Petitioner had not proven that his prior counsel performed deficiently in failing to raise the *Batson* claim, because the court could not even determine whether the underlying claim had merit. Because we have decided that: Pennsylvania's *Spence* rule is a not an unreasonable application of *Batson*; the Pennsylvania Supreme Court's application of the *Spence* rule to Petitioner was not unreasonable; and that its refusal, in the absence of a finding of a prima facie case, to look at the explanations for peremptory strikes given by the prosecutor was not an unreasonable decision, we conclude that the Pennsylvania Supreme Court was not unreasonable in finding that the underlying *Batson* claim had not been proven. We find that the court's adjudication of the ineffectiveness claim, using the finding that the underlying

claim had not been proven, was not an unreasonable application of *Strickland*, because *Strickland* instructs that if the petitioner has not shown that underlying claim has merit, counsel cannot have been ineffective for failing to raise it. *Strickland*, 466 U.S. at 691.

(2) Procedurally Defaulted *Batson* Claim

We have found that PCRA's procedural rules, 42 Pa. Cons. Stat. §§ 9543(a)(3) and 9544(b), act as an independent and adequate state ground that bars us examining the *Batson* claim on the merits, and we may only examine the claim on the merits if Petitioner can show cause for and prejudice from the procedural default that resulted from his failure to present the *Batson* claim on direct appeal. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); Part III. B. 2, *supra*. Petitioner alleges ineffective assistance of counsel on direct appeal to excuse the default. This allegation has been exhausted, as required, *see Edwards v. Carpenter*, 529 U.S. 446, 452 (2000); *Murray v. Carrier*, 477 U.S. 478, 487-92 (1986), by being fairly presented to the PCRA hearing court and to the Pennsylvania Supreme Court on PCRA appeal. We believe our determination of whether ineffective assistance of counsel exists, for the purpose of establishing cause, is de novo, even though we have just held, under the AEDPA standard of review, that the state's adjudication of the claim of ineffective assistance of direct appeal counsel was not unreasonable. *See Edwards*, 529 U.S. at 452-53 (applying de novo review to allegations of ineffectiveness of counsel as cause and prejudice to excuse a procedural default); Part III. B. 2 & n.12, *supra*.[45] We find that, given the state of the law

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[45] Nevertheless we have a concern. Obviously exhaustion is required to allow the state court to act. If they do so must we respect their adjudication? If not, why require exhaustion?

and the record at the time of direct appeal, direct appeal counsel did not act unreasonably in not raising the *Batson* claim, and therefore cause has not been shown.[46] Even if we were incorrect in finding that the PCRA rules are an independent and adequate state bar, and were required to examine the claim on the merits, we would not find a *Batson* violation on the expanded record before us.[47]

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[46] *Batson* violations are within those categories of cases for which prejudice is presumed. A *Batson* violation is a structural error, affecting the entire trial process, and is thus per se prejudicial. *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Batson*, 476 U.S. at 100 ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."). If we were to reach the issue of prejudice, we would be required to find that prejudice was established.

[47] If we were incorrect as to the adequacy of these rules in barring our review of the underlying claim, we would also be faced with issue of whether the Pennsylvania Supreme Court's implicit finding that trial counsel failed to object and preserve the *Batson* issue for appeal, and its subsequent application of the contemporaneous objection waiver, is an independent and adequate state ground barring our review. If it were, Petitioner would have to show cause and prejudice as to trial counsel. In the course of our examining whether appellate counsel acted reasonably in failing to raise the *Batson* claim, we examined the merits of the claim, because counsel cannot have been ineffective for failing to raise a meritless claim. *Strickland*, 466 U.S. at 691. Because we have found, even on the expanded record before us, that a *Batson* violation has not been proven, trial counsel could not have been ineffective in failing to object, even if one could conclude that his statements alerting the trial court to the ADA's pattern of striking only Blacks, his moving for a mistrial, and his subsequent noting

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(a) Further Development Of The Facts

The Commonwealth objects to any further development of the fact underlying the *Batson* claim, but we have allowed limited discovery. Petitioner cannot succeed in showing cause for his default unless appellate counsel was ineffective for failing to pursue the *Batson* claim. Counsel cannot have been ineffective if the *Batson* claim had no merit. *See Strickland*, 466 U.S. 668, 691 (1984). As stated, we believe we must look into the existence of cause de novo. Based on our comprehensive review of the record, and considering the Petition and legal memoranda of both parties, we concluded that the Petitioner had shown good cause for us to exercise our discretion and order limited discovery as to this claim pursuant to Rule 6 of the Rules Governing Section 2254 Cases,[48] because such an expanded record might have shown that there had been a prima facie *Batson* violation.[49]

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for the record the race of all jurors peremptorily stricken by the Commonwealth (N.T. 5/15/86 at 129, 141, 150, 171; 5/16/86 at 32, 37) should not be considered an objection sufficient to preserve the issue for appeal.

[48] Our order was also based our authority to order expansion of the record to include "additional materials relevant to the determination of the merits of the petition." Rule 7 of the Rules Governing Section 2254 Cases.

[49] Our order was for the limited purpose of determining whether cause was present. Furthermore, we believe that, when making de novo review, ordering limited discovery or expansion of the record pursuant to Rule 6 or Rule 7 of the Rules Governing

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If a prima facie *Batson* violation had been shown, the burden of proof would have then shifted to the Commonwealth and required us to give the Commonwealth an opportunity to rebut the prima facie case by offering any race-neutral reasons that the prosecuting ADA might have had for striking African-Americans. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986). On July 5, 2001, we therefore vacated the portion of our prior order of August 7, 2000 denying discovery as to evidence supporting the claim of racial discrimination in the

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§ 2254 Cases is not inhibited by AEDPA's restrictions on holding evidentiary hearings, 28 U.S.C. § 2254 (e)(2). There is also authority that providing discovery is not an evidentiary hearing. *See Boyko v. Parke*, –F.3d.–, 2001 WL 863598, *7 (7th Cir. July 27, 2001); *McNair v. Haley*, 97 F. Supp. 2d 1270, 1279-86 (M.D. Ala. 2000). The *McNair* court stated: The AEDPA did not amend Rule 6 or Rule 7, and "the only way to bridge the gap between AEDPA's modification of requirements for an evidentiary hearing and the conclusion that AEDPA restricts federal habeas review to the state court record is to read the reference to evidentiary hearings as a metonym for all evidence." *McNair*, 97 F. Supp. 2d at 1281. Principles of statutory construction direct us to examine the words of the statute, *see United States v. James*, 478 U.S. 597, 604 (1986), used in "their ordinary and usual sense," *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917). Section 2254(e)(2) directs that we "shall not hold an evidentiary hearing" in certain circumstances. There is no reason to believe that "evidentiary hearing" means something other than "evidentiary hearing." *See McNair*, 97 F. Supp. 2d at 1281-82 (finding no clear legislative intent to the contrary). An evidentiary hearing is a formal proceeding in court "at which evidence is presented, as opposed to a hearing at which only legal argument is presented." Black's Law Dictionary 725 (7th ed. 1999). Ordering that the parties provide discovery of certain documents to each other under Rule 6 and that they submit the documents to the Court under Rule 7 is quite different than holding an evidentiary hearing.

selection of Petitioner's jury, and ordered that both the Commonwealth and Petitioner provide to both opposing counsel and the Court such discovery materials as they had in their actual or constructive possession or control regarding the racial composition of the entire venire, the races of the potential jurors challenged by the Commonwealth both for cause and peremptorily, the races of the seated jurors, and the reasons for the Commonwealth's exercise of peremptory challenges at Petitioner's trial.

Petitioner provided evidence as to the contents of voter registration records that he had referred to in his Petition, his memoranda of law, and in his brief to the Pennsylvania Supreme Court on PCRA appeal. The data appears to have been derived from a search of a voter registration database in June 1998 and indicates the names, addresses, races and years of birth of some of the venirepersons. The Commonwealth provided a number of documents. First, there was a list of the twelve jurors and two alternates, presumably made by ADA Barth as the jury was selected, or shortly thereafter. The list includes the juror numbers, race and gender, as well as other facts elicited during voir dire, such as whether the person was married or had children, and if so, how many; neighborhood of residence; and type of employment. Second, there were fifteen pages of notes regarding 86 of the 87 venirepersons questioned. For each potential juror, the notes include juror number; race and gender; the disposition of questioning, e.g. peremptory challenge or challenge for cause by the Commonwealth or the defendant; answers to some of the questions propounded by counsel; and occasionally, what may be construed as mental impressions of the ADA. Third, there were six dot-matrix-printed pages listing the jury panels, containing juror numbers and names. Written on these lists were notes, presumably made by ADA Barth, as to the answers given by the jurors to the questions

propounded by Judge Sabo to the panel as a whole before individual questioning began, such as whether anyone personally knew someone involved in the case.[50]

If we may look at such evidence for the limited purpose of determining whether cause is present, such evidence confirms that the Commonwealth exercised peremptory challenges against twelve venirepersons, eleven of whom were Black and one of whom was White. The evidence also confirms that of the first nine jurors chosen, two were Black and seven were White, and shows, for the first time, the races of the final three jurors–two White and one Black. The evidence also shows that none of the nine potential jurors who were first accepted by the Commonwealth before being stricken by the defense were African-Americans.

Based on the discovery evidence submitted by both parties, on July 24, 2001, our deputy clerk contacted counsel for both parties, Thomas W. Dolgenos, Esq., for the Commonwealth and David Wycoff, Esq., for Petitioner, to schedule an evidentiary hearing, pursuant to Rule 8 of the Rules Governing Section 2254 Cases, so the prosecutor in Petitioner's case, Drew R. Barth, Esq., could authenticate the notes and aid in deciphering any illegible or ambiguous notes.[51]

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[50] There were also eight pages of notes that were written in obviously different handwriting than the other lists and were extremely difficult to decipher. There appear to be names of fifteen or sixteen persons with notes written under each name. The names are sufficiently legible for us to conclude that none of them referred to members of the venire at Petitioner's trial.

[51] Petitioner's trial counsel, Barry Denker, is deceased. If he had been alive, we probably would have sought his testimony as to his recollection of voir dire.

Further, if we would have thereafter found a prima facie *Batson* violation to exist, we could have given him the opportunity to articulate his reasons, if possible more than fifteen years after trial, for exercising peremptory challenges against African-Americans. If we had found a prima facie case, the second step of the *Batson* analysis would have required us to allow the Commonwealth to attempt to provide race-neutral reasons in this way. Unfortunately, Mr. Barth is no longer an ADA with the Philadelphia District Attorney's Office, but Mr. Dolgenos was able to locate him in another state. Both counsel spoke with Mr. Barth, who informed them that due to a psychiatric disability, he is incapable of testifying at an evidentiary hearing, and he has no specific recollection of the case. On July 25, 2001, we held a telephone conference with both counsel, during which Mr. Dolgenos informed us of the lack of availability of Mr. Barth, and the reasons therefore.[52] Neither counsel disputed that Mr. Barth was unavailable. We requested that counsel examine the evidence and file a joint stipulation as to the contents of the evidence to the extent possible. Counsel agreed to do so, with the Commonwealth preserving its argument that an evidentiary hearing or other factual development at this stage was not proper. We received such stipulations on August 1, 2001, and promptly scheduled, then held, oral arguments on

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[52] We therefore never held an evidentiary hearing on any aspect of the merits of the stand-alone *Batson* claim itself. If Mr. Barth had been available and we had made an attempt to hold an evidentiary hearing on the facts underlying the *Batson* claim, we would have been squarely presented with the question of whether 28 U.S.C. § 2254(e)(2) would have restricted our power to hold such a hearing.

the evidence on August 2, 2001, at which time Petitioner filed a Motion for Summary Judgment on the *Batson* claim.[53]

Thereafter, we realized that because the *Batson* claim had not been raised at the PCRA evidentiary hearing that was held on February 10, 1997, Petitioner's appellate counsel had never been examined to determine his reasons for not raising the *Batson* claim on direct appeal. Because the reasonableness of his representation would be dispositive of cause to excuse Petitioner's procedural default of his *Batson* claim, if we found that such claim had merit, we felt it prudent to give him the opportunity to explain himself, if possible, instead of merely relying on case law and our own knowledge and analysis to determine whether he acted reasonably. On August 3 our deputy clerk located Petitioner's direct appeal counsel, Mr. Robert R. Redmond, in another district. On the same day, we conferred with both counsel on the record by telephone about the possibility of holding an evidentiary hearing or using other methods to take Mr. Redmond's evidence. On August 6, after considering Petitioner's letter of that date asserting the need for a hearing,[54] rather than using other means of taking evidence, and of his right and desire to be present; the Commonwealth's letter of that date objecting to our holding an evidentiary hearing, based on the AEDPA's restrictions on federal habeas courts' power to conduct such

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[53] We commend counsel for their alacrity in providing discovery, attempting to schedule an evidentiary hearing, and scheduling and participating in oral arguments on an expedited basis, as well as on their skill and professionalism in doing so.

[54] We specifically instructed counsel that in this case we would accept, and indeed encouraged, this informal method of communication with the us in order to expedite our consideration of any issues arising with regard to the *Batson* claim.

hearings; and on the oral arguments of counsel via telephone conference call on the propriety of such a hearing, we scheduled a hearing for August 16 to take the evidence of Mr. Redmond.[55] On August 14 the Commonwealth filed a Response to Petitioner's Motion for Summary Judgment on the *Batson* Claim and a Motion for Reconsideration of Grant of Evidentiary Hearing. The evidentiary hearing was held on August 16, 2001, at which time we denied the Motion for Reconsideration. Both parties filed post-hearing letter-briefs on August 17, 2001.

Based on Mr. Redmond's testimony at the evidentiary hearing, on both direct and cross-examination, and the exhibits presented at the evidentiary hearing, insofar as they reflect

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[55] The hearing was held in the face of an objection by the Commonwealth that the hearing was untimely and barred by the AEDPA. We believe we were not precluded from holding an evidentiary hearing by 28 U.S.C. § 2254(e)(2), which applies only if Petitioner has "failed to develop the factual basis of a claim in State court proceedings." We held an evidentiary hearing to ascertain underlying facts needed by us to determine whether direct appeal counsel acted unreasonably, which would support a finding of cause, for a showing of cause and prejudice under *Coleman*, and thus allow us to examine the *Batson* claim on the merits. Cause and prejudice is merely an excuse, allowing us to consider the merits of an otherwise procedurally defaulted ground for habeas relief; it is not a claim, or a ground for habeas relief, in itself. We have already determined that the Pennsylvania Supreme Court's adjudication of the claim of ineffective assistance of direct appeal counsel for failing to raise the *Batson* claim was reasonable under 28 U.S.C. § 2254(d)(1); now we are merely examining that allegation of ineffective assistance, de novo pursuant to the doctrine of procedural default, to determine whether that default may be excused. *See* n.12, *supra*.

on Mr. Redmond's credibility, we make the following findings of fact:[56]

[56] We believe that we are barred by § 2254 (e)(2) from considering any of the evidence adduced by Petitioner at the August 16, 2001 evidentiary hearing to prove his newly presented argument that the *Batson* claim was fairly presented on direct appeal, an argument which itself was never fairly presented in state court. *See* n.38, *supra*. The only exception we know of to the application of (e)(2) to evidentiary hearings is the procedural default doctrine of *Coleman* and *Murray*, which we believe is unchanged by the AEDPA. *See* Part III. B. 2. & n.12, *supra*. Petitioner would have us create a new exception to examine the evidence for the purpose of showing that the *Batson* claim was fairly presented on direct appeal. This purpose clearly does not fit within a showing of cause, the only reason for which we could have held the hearing. Indeed, while trying to show that Petitioner raised the *Batson* claim pro se, Petitioner also argued that direct appeal counsel was reasonable in not raising the claim himself. Because the purpose for which Petitioner would have us use this evidence, and the argument thereon, does not fit within the one exception to the application of (e)(2), we must consider whether Petitioner can overcome the barrier presented by (e)(2).

We find that Petitioner must satisfy the requirements of (e)(2)(A) & (B), because Petitioner "failed" to raise this argument during his state collateral proceedings and adduce evidence thereon at the PCRA hearing. Petitioner had the opportunity to present evidence on any factual issue that he wished, and he failed to do so. The lack of development of the record was due to the "lack of diligence, or some greater fault, attributable" to Petitioner or his counsel. *Williams v. Taylor*, 529 U.S. 420, 432 (2000); 28 U.S.C. § 2254(e)(2). Petitioner cannot show that the narrow criteria of (e)(2) are satisfied. He cannot show that his claim relies on either a new, retroactive constitutional law that was previously unavailable, or a factual predicate that could not, with the exercise of due diligence, have been previously discovered. § 2254

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1. Mr. Redmond had been practicing law for more than ten years before he was appointed as Petitioner's direct appeal counsel, handling numerous criminal trial and appellate matters, including trials in which he made a record to establish the facts needed to show a *Batson* claim.

2. Mr. Redmond was aware of the possibility that a *Batson* claim could be asserted on direct appeal in Petitioner's case, because a motion for a mistrial had been made during voir dire, and a motion for a new trial had been made after Petitioner's conviction, both based on the allegation that the Commonwealth systematically excluded African-American venirepersons from Petitioner's jury.

3. Mr. Redmond reviewed the trial record of voir dire and found that it did not clearly disclose the races of all the jurors or the majority of venirepersons peremptorily stricken by the Commonwealth or disclose justifications or attempts at justifications for the majority of the peremptory challenges exercised by the Commonwealth.

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(e)(2)(A). Neither can he show that the facts supporting his claim are sufficient to establish, by clear and convincing evidence, that but for constitutional error no reasonable fact-finder would have found him guilty of the underlying offense. 28 U.S.C. § 2254 (e)(2)(B). Therefore we find that § 2254(e)(2) bars us from considering the evidence adduced at the evidentiary hearing for the purpose of showing that the *Batson* claim was fairly presented to the Pennsylvania Supreme Court on direct appeal and was thus exhausted. We may only consider such evidence for the purpose of determining whether Mr. Redmond acted reasonably in deciding not to raise the *Batson* claim himself in the direct appeal brief he filed on behalf of Petitioner.

4. Mr. Denker, Petitioner's trial counsel, was unavailable for questioning by Mr. Redmond to help to build the record of the races of the jurors accepted and the venirepersons stricken by the Commonwealth.

5. Mr. Redmond felt that the prevailing law did not set forth a clear standard of what actions would constitute a *Batson* claim, or of what type of record would be required in order to prove a *Batson* claim.

6. Mr. Redmond did not pursue the *Batson* claim on direct appeal because he felt that the trial record did not contain enough evidence to raise an inference that a prima facie case existed or that there was otherwise a meritful *Batson* claim in light of the prevailing law at the time he filed the appeal.

7. Mr. Redmond felt that, on the basis of the record before him and the uncertainty in the standard to be applied, due to the limited number of cases applying *Batson* at the time he filed the appeal and the uncertainty in the standards to be applied, the claim was weaker than other claims he could raise, and he felt that it was more important to focus on stronger claims.

(b) Reasonableness Of Direct Appeal Counsel's Decision Not To Assert The *Batson* Claim

We find that appellate counsel was not unreasonable for failing to pursue the *Batson* claim. When a petitioner alleges that his attorney was ineffective in pursuing a particular strategy, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance." *Strickland*, 466 U.S. at 689. The Supreme Court held, in *Jones v. Barnes*, 463 U.S. 745 (1983), that "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Jones*). In explaining the reasonableness of appellate counsel's decision not to raise every colorable claim, the *Jones* Court noted that "experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones*, 463 U.S. at 751. In *Robbins*, the Court noted that while "it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, . . . it is difficult to demonstrate that counsel was incompetent." 528 U.S. at 288. Finally, the *Robbins* Court explained that to show counsel acted unreasonably in failing to raise a claim, the petitioner would have to show "that [the] particular nonfrivolous issue was clearly stronger than issues that counsel did present." *Id.*

We have found that Mr. Redmond concluded that the trial record was incomplete, such that it did not contain enough evidence to raise an inference that a prima facie case existed or otherwise included enough evidence to prove a *Batson* violation in light of the prevailing law at the time he filed the direct appeal brief.[57] Because an attorney can

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[57] Appellate counsel could not alter the trial record. In light of the contemporaneous objection rule and the need to build a record at trial, the Pennsylvania Supreme Court may not have given him permission to supplement the record. Even if he had received permission to supplement the record and had investigated

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reasonably not raise claims that are without merit, *see Strickland*, 466 U.S. at 691, or appear to be without merit, *see Robbins*, 528 U.S. at 288, his decision that the claim was either weak or without merit was reasonable, given the state of the record and the law at that time.

Based on *Commonwealth v. Hardcastle*, 546 A.2d 1101 (Pa. 1988), the only opinion of the Pennsylvania Supreme Court applying *Batson* before Petitioner's direct appeal brief was filed, a reasonable advocate would likely believe that Petitioner's *Batson* claim had very little chance of success.[58] In *Hardcastle*, the court found that there had been no *Batson* violation upon a pattern of strikes and racial

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to attempt to determine the races of the jurors, the venire, and the persons peremptorily stricken by the Commonwealth, such as by investigating voter registration records, as was done by PCRA appeal counsel, a *Batson* claim was weak under existing law. Nor could counsel have been ineffective for failing to present such evidence as required by the *Spence* rule, even if he could have expanded the record, because counsel is not required to be prescient. *See, e.g., Sistrunk v. Vaughn*, 96 F.3d 666, 671 (3d Cir. 1997) (holding that direct appeal counsel could not have been ineffective for failing to raise a *Batson*-type claim before *Batson* had been decided by the Supreme Court); *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989) ("There is no general duty on the part of defense counsel to anticipate changes in the law.").

[58] Counsel cannot have been ineffective for failing to anticipate changes in the law that might have made the *Batson* claim seem stronger, because, as we have just explained, *see* n.57, counsel is not required to be prescient.

composition of the jury similar to those in Petitioner's case.[59] Fourteen African-Americans had been questioned during voir dire, and the Commonwealth had exercised twelve of the fifteen peremptory challenges it used against African-Americans. 546 A.2d at 1103. The resulting jury included one African-American. *Id.* Hardcastle's trial and judgment of sentence occurred before the *Batson* decision was issued, but Hardcastle's defense counsel preserved the issue by making a motion for a mistrial, subsequent to voir dire and prior to trial, based on the prosecutor's impermissible use of the challenges. *Id.* at 1104. The Pennsylvania Supreme Court therefore made "a post hoc evaluation of the record, examining each of the Commonwealth's fourteen peremptory challenges to determine whether appellant has made out a prima facie case of improper use." *Id.* Because the prosecutor had never been required to explain the reasons for her strikes, the Pennsylvania Supreme Court canvassed the voir dire transcript in search of race-neutral reasons to justify each of the strikes against African-Americans. The court concluded:

> A review of this record indicates that an identifiable reasonable basis for a challenge was available in at least ten of the Commonwealth's twelve peremptory challenges. In the other two instances the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the peremptory challenge. In addition, although the Commonwealth had ample challenges remaining, there were no challenges offered to two black jurors, one of whom

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[59] Hardcastle has since been granted federal habeas relief by a district court based on his *Batson* claim. *Hardcastle v. Horn*, 2001 WL 722781, No. 98-CV-3028 (E.D. Pa., June 27, 2001).

> ironically was challenged by the defendant. On this record we find that appellant has not made out a prima facie case of the Commonwealth's improper use of peremptory challenges.

Id. at 1105.

Based on the facts of the *Hardcastle* case, and the decision and analysis by the Pennsylvania Supreme Court, a reasonable advocate could have believed that Petitioner's *Batson* claim would have little chance of success before the Pennsylvania Supreme Court. The record of Petitioner's voir dire showed that eleven of the twelve strikes exercised by the Commonwealth were against African-Americans, and two of the first nine jurors seated were African-Americans, and that defense counsel had also struck an African-American. These facts are substantially similar to the corresponding facts in *Hardcastle*, and because the race of the final three jurors was unknown, the case might have seemed even weaker than that in *Hardcastle*. A reasonable advocate could have also expected the Pennsylvania Supreme Court to engage in a "post hoc evaluation of the record" as it did in *Hardcastle*, looking for race-neutral reasons for the strikes for which no reason was given, and looking for evidence that the reasons given were not pretexts. Based on our review of the record, we believe that such race-neutral or non-pretextual reasons could be found as to each juror stricken, were a court of a mind to find them. A reasonable advocate could as easily come to the same conclusion. Even if the record did not indicate "an identifiable reasonable basis" for each challenge, as the Pennsylvania Supreme Court had sought in *Hardcastle*, that court could have again relied on its conclusion that "the Commonwealth had the opportunity to observe the witnesses and their response to questioning prior to exercising the

peremptory challenge," and therefore the challenges must have been reasonable. *Hardcastle*, 546 A.2d at 1103.

The analysis in *Hardcastle* conflates the prima facie case analysis with that of possible race-neutral reasons for strikes and the determination of whether such reasons are pretexts. Given this analysis, a reasonable advocate would have been justified in not proceeding even though the prosecutor in Petitioner's case had offered specific reasons for some of his strikes. In addition, no cases binding on the Pennsylvania Supreme Court had yet held that when such reasons had been offered, a court might or must ignore the absence of a prima facie case and examine the reasons to determine whether they were race-neutral or pretexts. *See* Part III. e. (1) (c), *supra*.

We find that Petitioner has not shown that the *Batson* claim *clearly* had a better chance of success than issues that counsel did present in the direct appeal, *see Robbins*, 528 U.S. at 288, because based on the record that he had and the law at the time, he could not have expected the Pennsylvania Supreme Court to find even a prima facie case of racial discrimination in the selection of Petitioner's jury, and therefore direct appeal counsel was not unreasonable in deciding not to raise the *Batson* claim. Moreover, even on the expanded record before us, we find that Petitioner's *Batson* claim does not have merit, and therefore direct appeal counsel could not have been unreasonable for failing to raise it. *Strickland*, 466 U.S. at 691. Each of these reasons is sufficient for us to find that direct appeal counsel's representation of Petitioner was not ineffective when he chose not to and did not raise the *Batson* claim, and we do now make such a finding; therefore Petitioner cannot show cause to overcome the procedural default that arose because the claim was not raised on direct appeal.

(c) Lack of a Prima Facie Case

We do not find a prima facie case of a *Batson* violation on the expanded record before us. In *Batson*, the Court directed that the trial court examine the totality of the circumstances to determine whether the court could infer discriminatory intent on the part of the prosecutor in exercising his peremptory challenges. *Batson*, 476 U.S. 79, 97 (1986). As examples of relevant circumstances that may be examined to infer discriminatory intent, the Court pointed to a "'pattern' of strikes against black jurors included in the particular venire" and "the prosecutor's questions and statements during voir dire examination and in exercising his challenges." *Id.* at 97. The Third Circuit, in *United States v. Clemons*, also directed that trial courts examine all relevant factors, and suggested five factors types of evidence that would be relevant: (1) the number of racial group members in the panel, (2) the nature of the crime, (3) the race of the defendant and the victim, (4) a pattern of strikes against racial group members, and (5) the prosecution's questions and statements during the voir dire. 843 F.2d 741, 748 (3d Cir. 1988). The Third Circuit made clear that its list was merely illustrative and should not be construed as preventing trial judges from addressing other facts and circumstances. *Id.* Subsequently, in *Jones v. Ryan*, the Third Circuit also directed that statistical disparities should be examined "in determining whether a prima facie case has been established." 987 F.2d 960, 971 (3d Cir. 1993) (citing *Batson*, 476 U.S. at 95 (citing *Castaneda v. Partida*, 430 U.S. 482 (1977))).

In directing that the totality of the circumstances be examined, the *Clemons* court declined to create a bright line rule as to the number or percentage of challenged Black jurors that might establishing a prima facie case, because

such a rule would be "contrary to the letter and spirit of *Batson*." *Id.* at 746. The Third Circuit explained that "striking a single black juror could constitute a prima facie case even when blacks ultimately sit on the panel and even when valid reasons exist for striking other blacks." *Id.* at 747 (citing *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987), *vacated on reh'g in part on other grounds*, 836 F.2d 1312 (11th Cir. 1986)). The court also "doubt[ed] the significance of including a single black on a panel if, at the same time, the government used most of its peremptory challenges (e.g., thirteen of sixteen) to strike blacks with backgrounds similar to the white jurors ultimately selected. In that case, the mere presence of a single black on the jury would not necessarily prevent a finding of a prima facie case." *Id.* & n.4 (citing *United States ex rel. Yates v. Hardiman*, 656 F. Supp. 1006, 1016 (N.D. Ill.), *rev'd* 830 F.2d 195 (7th Cir. 1987), which had this factual situation, not as precedent but "to illustrate the shortcomings of per se rules"). The Third Circuit again noted that it could not "conclude that inclusion of blacks on a jury bars a prima facie case, especially where other facts and circumstances may constitute an inference of prosecutorial discrimination in the selection process." *Id.* at 748.

Petitioner and the victim are members of the same race, (N.T. 5/19/86, at 57) (testimony of medical examiner that the victim was a "Negro male"), and the crime contains no apparent racial overtones, therefore these considerations do not support the finding of a prima facie case.

The notes of voir dire reveal nothing explicit in the statements or questions of the prosecutor that would indicate that he considered race to be a factor in any way in jury selection. Race was explicitly mentioned only three times during the entire voir dire, and each time defense counsel brought up

the subject. In two cases, relatives of the potential jurors had been victims of crime, and defense counsel inquired as to the race of the attackers. In both cases African-Americans were accused of committing the crimes. Both potential jurors indicated that such facts would not influence them in the instant case, the trial of an African-American. As to the first, the Commonwealth found her acceptable, but the Defense exercised a peremptory challenge. As to the second, the Commonwealth challenged for cause because the venireperson indicated that he was unable to impose the death penalty. A third venireperson denied that she would have any difficulty sitting as a juror in a case in which the defendant was Black, but the defense peremptorily struck her anyway. Therefore, the prosecution's questions and statements during voir dire do not support the finding of a prima facie case.

For the purposes of discussion we will assume that the notes of voir dire were taken by ADA Drew R. Barth. These notes appear to reflect the race and gender of 86 of 87 of the venirepersons questioned by the court and counsel,[60]

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[60] The fact that these notes reflect the race of each venireperson does not in itself, or in combination with other factors, raise an inference of racial discrimination in the selection of the jury. Voir dire in this case began exactly two weeks after *Batson* was handed down, and therefore no trial participant could know what would be required to prove a *Batson* claim or rebut such an allegation, because *Batson* established only broad standards. We find it more plausible to infer that the ADA kept track of the race of each venireperson to later show that he had not violated *Batson* than to infer that he kept track of their races in an attempt to discriminate. The notes appear to have been made contemporaneously, as voir dire progressed. Keeping track of the race of all venirepersons already questioned would not seem to further a goal of discriminating in the selection of the remaining jurors, unless the goal was

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including those questioned after the first twelve jurors and before all of the alternates were chosen.[61] Of the 86 persons for whom there was such information, 51 persons were white and 35 were African-Americans. These notes also show that the prosecutor exercised eleven out of twelve, or 91.6 %, of his peremptory challenges against African-Americans, and defense counsel exercised eighteen out of nineteen, or 94.7 %, of his peremptory challenges against whites.[62] Further, the notes, as well as the voter registration records submitted by Petitioner, show that nine jurors were white, three were

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a certain ratio of Blacks and Whites, and the ADA simply kept track of the races of all venirepersons in an attempt to keep track of the races of the chosen jurors. The evidence of the races of the venirepersons reflected in these notes, presumably observed by and recorded by the ADA, cannot be used to discern the intent of the ADA, because it is open to multiple credible interpretations. It is also doubtful that the ADA would keep notes of actual discrimination.

[61] With regard to the alternates, there was one challenge for cause by the Commonwealth of an African-American; one peremptory strike by the defense of a white person; and two alternates, also white. We will not consider the alternates in our analysis of the pattern of peremptory strikes.

[62] We recognize that the Defense's strikes are not necessarily relevant to whether the prosecutor violated *Batson*; we include the information merely in the interest of presenting a comprehensive picture of the voir dire. It is also plausible, as the Commonwealth asserts, that it was apparent to the ADA that defense counsel was striking Whites almost exclusively, and, as a matter of strategy in order to preserve his peremptory challenges, he did not strike many Whites whom he otherwise might have, in reliance on the likelihood that defense counsel would strike them.

African-Americans, and both alternates were white.[63] No African-American potential jurors were first accepted by the prosecution but then peremptorily stricken by the defense.[64]

We find it more helpful to examine the prosecutor's peremptory strikes and the resulting racial composition of the trial jury in light of the venirepersons who were not stricken for cause or stricken by agreement.[65] These venirepersons, rather than the entire venire, are the ones who were actually available for peremptory strikes.[66] If these persons are subjected to analysis, it appears that fifteen African-Americans

[63] The voter registration records submitted by the Petitioner indicated that one of the jurors identified by the Commonwealth as Black, Horace Eggleston, is listed as "O," presumably "Other." The record of voir dire, however, indicates that defense counsel and the court considered Mr. Eggleston to be Black.

[64] The Pennsylvania Supreme Court would require such information under its *Spence* rule.

[65] Nine African-Americans and six whites were stricken by the Commonwealth for cause; two African-Americans and five whites were stricken by the defense for cause; and nine African-Americans, ten whites, and one person of unknown race were stricken by agreement of counsel.

[66] We recognize that as voir dire progressed, the ADA could not know the racial composition of this subset of the venire, or even of the entire venire. It appears that jurors were brought in to the courtroom in three sets of two panels, i.e. approximately 40 persons at a time. There is no indication on the printed lists of these panels that the ADA counted or kept track of the race of the venirepersons, even though notes were made on these lists. The only evidence that the ADA kept track of the race of the venirepersons is that in the notes that appear to have been made as voir dire progressed.

and twenty-seven whites were available for selection as jurors. In other words, 35.7 % of the pool of persons available to be jurors were African-American, and 64.3 % of this pool were white. The resulting jury was 25 % African-American and 75 % white, which does not seem to be a large statistical disparity from what was available. Indeed it is a difference of only one juror. Viewing the data in this way, it is very difficult to infer any sort of racial discrimination by the ADA during voir dire. Of course we could look at the data differently, by only examining the pool of persons available to the ADA to strike, i.e. removing from consideration all persons who were stricken by the defense before the ADA had an opportunity to do so: 42.4 % of the pool were African-American, and 57.6 % were White. This would make the statistical disparity greater–two jurors. Instead of focusing on the actual trial jury, we could focus only on the strikes exercised by the prosecutor. He struck 78.6 % of the African-Americans available for him to strike, but struck only 5.3 % of the whites available for him to strike. Another way of looking at his strikes is that, of the people he could have stricken, 21.4 % of the African-Americans and 47.4 % of the whites ended up on the jury. This latter way of looking at the pattern of strikes does not seem nearly as troubling as the former.

The foregoing analysis illustrates the ease of manipulating data or interpreting statistics differently so as to further particular goals.[67] Any number of results are equally possible. We therefore reiterate the need expressed by the Third Circuit to eschew using bright line tests or relying on statistics alone to find a prima facie case, and instead to consider

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[67] We also therefore decline to use the Baldus study to aid us in determining whether there is a prima facie *Batson* case before us.

all of the relevant circumstances.[68] After weighing the foregoing factors, we conclude that a prima facie case has not been established.[69]

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[68] The transcript of the jury selection training video produced by the Philadelphia District Attorney's Office sometime in the year following Petitioner's trial is troubling. Nevertheless, even if we could impute any racial policy set forth in the video to the District Attorney's Office, if we had evidence that it was actually used as a training video for prosecutors, we decline to do so, because it has no bearing on this case. First, we would not retroactively find that such a policy existed at the time of Petitioner's trial. Second, there is no evidence that ADA Barth was aware of such a policy, and if he was, that he adhered to it. There is no evidence that he ever viewed the tape, but even if he did, he would have done so long *after* Petitioner's trial. Further, even if the tape were relevant, we could draw no persuasive conclusions from it. Some strikes and acceptances of jurors appear consistent with the teachings in the videotape, but others appear to disregard it.

[69] Perhaps if Petitioner had sought to develop the factual basis of this claim at the proper time, i.e. at his PCRA evidentiary hearing, the outcome may have been different. If ADA Barth had been available to testify, and had, for example, identified the notes as his and explained why he kept track of the races of the jurors, perhaps the PCRA court, or this Court, on habeas review, could have found a prima facie case, if ADA Barth kept track of race for a reason that raised an inference of discrimination. As we explained earlier, Petitioner's PCRA hearing counsel was clearly on notice of the need to develop the record, but he did not even attempt to do so. Because Petitioner, or his counsel, whose fault is attributable to Petitioner, failed to develop the record at the earliest opportunity, his key witness, Mr. Barth, is no longer available, and even if he were, we might be barred by § 2254(e)(2) from taking his evidence. This shows the need for making a record early on.

(d) Explanations Offered By The Prosecutor For His Strikes

Even in the absence of a finding of a prima facie case, we are required to examine any reasons actually given by the prosecutor for his strikes. In *Hernandez v. New York*, a plurality of the U.S. Supreme Court found that the issue of the prima facie case was moot when the prosecutor has attempted to explain the reasons for his peremptory strikes without "prompting or inquiry from the trial court" and "the trial court has ruled on the ultimate question of intentional discrimination." 500 U.S. 352, 358-359 (1991) (plurality) (quoting *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.")) Even before *Hernandez*, the Third Circuit examined any such reasons proffered by a prosecutor before a prima facie case had been found. *See United States v. Clemmons*, 892 F.2d 1153, 1155-56 (3d Cir. 1990) ("In addition, independent of the strength of the evidence tendered as a prima facie case, once a prosecutor attempts to explain a peremptory challenge, we believe the trial and reviewing courts should look to the entire record to determine if intentional discrimination is present. If the prosecutor's explanation raises more concern than it puts to rest, courts cannot effectively close their eyes to that fact by simply deciding that the defendant has not made out a prima facie case."); *see also United States v. Clemons*, 843 F.2d 741, 748-49 (3d Cir. 1988) (examining reasons offered by prosecutor after the district court ordered him to do so, "out of an abundance of caution," even though the district court never made a finding that a prima facie case existed).

The Third Circuit has modified and expanded this principle. In *United States v. Uwaezhoke*, the prosecutor, in response to a question from the trial court before it had ruled on the prima facie case issue, explained why he had exercised his peremptory challenge. 995 F.2d 388 (3d Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994). In subsequently examining the *Batson* claim, the Third Circuit held: "If the government is found at any subsequent stage of the case either to have tendered an explanation that is not race neutral or to have acted with racial animus, the conviction must be overturned without regard to whether the defendant established a prima facie case."). *Id.* at 392. In *Johnson v. Love*, the Third Circuit explained that its precedent required it to consider explanations of prosecutors made even in the absence of a finding of a prima facie case, but it also noted that the record before it reflected a prima facie case. 40 F.3d 658, 663-64 (3d Cir. 1994) (citing *Hernandez*, *Uwaezhoke*, and *Clemmons* approvingly). Therefore we will examine the actual statements offered by the prosecutor that appear in the record of testimony of voir dire, even though Judge Sabo never made a finding that a prima facie case existed.[70] In

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[70] Even if it were proper for us to examine the handwritten notes of the prosecutor to look for his reasons for striking African-American venirepersons, instead of relying on his actual statements, we would not find a *Batson* violation based on these notes. We believe that we would have been required under *Batson* to hold a hearing to allow the prosecutor to testify and be cross-examined as to his reasons for striking African-Americans. We would not have been restricted by 28 U.S.C. § 2254(e)(2), because after finding a prima facie case, the burden of proof would have shifted to the Commonwealth; in the absence of its rebuttal, Petitioner would have been entitled to habeas relief. We could not have relied on the prosecutor's notes, because they are ambiguous. The very nature of notes makes them ambiguous–they are jottings,

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doing so, we find that the reasons given by the prosecutor were race-neutral, even though the race of each juror is mentioned in the explanation, and that these reasons are not pretextual.

During voir dire, after ADA Barth's peremptory challenge of a Black prospective juror, Brenda Forrest, Petitioner's trial counsel objected that "I believe the District Attorney has now used all his challenges on black jurors. I believe he has developed a pattern of striking them." (N.T. 5/15/1986, at 129.) Judge Sabo deferred discussion of the issue. *Id.* After the ADA struck another African-American, defense counsel again asserted that the ADA had developed a pattern of striking only Black prospective jurors, that only two of the nine jurors selected were Black, and then he asked for a mistrial. *Id.* at 141-42. In response, Judge Sabo gave the ADA an opportunity to explain his actions by asking: "Does the Commonwealth have anything to say at this time?" ADA Barth responded:

> Sure, Judge. As Mr. Denker has indicated, number one, we have nine seated in the box, two of whom are black. One black male and one black female. Mr. Denker is incorrect

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partial thoughts, incomplete accounts of the occurrences they call to mind. The prosecutor was not asked to write down his reasons; the notes are mostly data about venirepersons, with a few mental impressions that are open to interpretation. Only if the notes had clearly indicated the prosecutor's subjective intent in exercising his peremptory challenges, so as to be a substitute for testimony on that topic, would they have been useful; at step 2 of the *Batson* analysis, neither the Court nor the parties may scour the record for evidence on which to base conjectures of possible race-neutral, or race-based, reasons for the strikes.

> when he tells the Court that I have used my pre-empts exclusively on blacks, that's not true. I've struck a white woman also.

Id. at 142. ADA Barth said nothing further on the topic at that time. Instead, Judge Sabo noted that the defense also struck a black woman, "juror number eight on yesterday's list." *Id.* Thereafter Judge Sabo discussed this juror and the possible reasons that Mr. Denker struck her, and then ended discussion on the topic, taking a recess. *Id.* at 142-44.

In his Motion for Summary Judgment on the *Batson* Claim, Petitioner encourages us to consider the statement by ADA Barth to be a failure to give race-neutral reasons for his strikes in response to Judge Sabo's inquiry, and find that his statements were not race-neutral reasons, or any type of reason for the strikes. (Mot. Summ. J. at 5-8.) Petitioner asserts that the statements are at most nothing more than generalized denials of discrimination, which do not satisfy *Batson*'s requirement that race-neutral reasons be given. *Batson*, 476 U.S. at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirming his good faith in making individual selections.'") (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)). We agree that these statements were not "any type of reason" for the strikes, but we disagree that they were generalized denials of discrimination as prohibited by *Batson*. The statement is, as a whole, ambiguous as to the intention of the ADA in making it. One could infer that the ADA was denying that he had a discriminatory motive, but one could as easily infer–and indeed, need not infer, just take the literal meaning of his statement–that the ADA was merely confirming the number of African-Americans seated on the jury as that which had been asserted by defense counsel, but then pointing out that defense counsel's assertion as to his

exercise of peremptory challenges was incorrect. Because the intention of the statement is ambiguous, and because when it was made, the trial court had not found a prima facie, we cannot assume that ADA Barth's statements were actually an attempt to give reasons of the sort required by *Batson*. Therefore, we can consider such statements to be neither an attempt to rebut a prima facie case, nor an explanation that should be regarded such, so as to require our examination of it under *Johnson v. Love*, 40 F.3d 658 (3d Cir. 1994), and similar cases previously discussed.

Petitioner also argues that the notes of voir dire reveal that in the cases of two of the three African-American venirepersons for whom the prosecutor gave reasons for exercising peremptory strikes, Robert Keel and John Hackley Sr., the reasons given were not race-neutral and were pretextual. We find that the reasons given by the prosecutor were race-neutral, even though the race of each juror is mentioned in the explanation, because the record clearly shows a give-and-take between defense counsel and the ADA in which defense counsel identified the stricken jurors as Blacks, and the ADA acknowledged that they were Black, and then noted other identifying characteristics or reasons for striking them.

When we closely analyze the reasons given and look at all the surrounding circumstances, including the prosecutor's questions to these venirepersons, and their answers, we find that intentional racial discrimination has not been proven. The prosecutor noted for the record that Mr. Keel was a "single, young, unemployed, on welfare, black male." (N.T. 5/15/86 at 171.) However, it appears that Mr. Keel may have also had some difficulty in comprehending or answering the questions asked of him by defense counsel: "Q. What area of the city do you live in? A. West Oak Lane. East Germantown. Q. Are you employed? A. No, I'm not.

Q. What members make up your household? A. Welfare, I say. Q. I'm sorry? A. Welfare." In this context, we would not find that the Commonwealth intentionally racially discriminated when it peremptorily struck Mr. Keel.[71]

After the Commonwealth struck Mr. Hackley, defense counsel noted without objecting that the venireperson was Black. (N.T. 5/16/86 at 32.) The ADA then noted for the record that the venireperson was a Black male approximately the same age as the defendant. In his Motion for Summary Judgment on the *Batson* Claim, Petitioner encourages us to find as a matter of law that this explanation is pretextual. He explains that the Commonwealth accepted numerous white jurors approximately the same age as the defendant, including some only a few years older or younger than Petitioner, and some with the same birth year. We decline to find his explanation pretextual as a matter of law, because the Commonwealth also accepted Horace Eggleston, who was also a Black male and was born in the same year as Petitioner. At worst, the ADA's explanation appears to be incomplete, but we can not find it to be a pretext to mask racial discrimination on this basis. Examining the record as we must at this third stage of the analysis, we also find other reasons to believe that the explanation offered was not an impermissible pretext. The record shows that Mr. Hackley lived in the neighborhood in which the crime occurred, and although he did not know many people in the neighborhood by name, he would recognize many people from the neighborhood. This raises the possibility that even though he might not have recognized the names of potential witnesses,

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[71] Petitioner challenged the strike of Mr. Keel in his earlier filings, but at oral argument his counsel stated that such challenge would not longer be pursued, and, indeed, Mr. Keel is not mentioned in the Motion for Summary Judgment.

he might have known them once he saw them. In this context, we would not find that the Commonwealth intentionally racially discriminated when it peremptorily struck Mr. Hackley.

(d) Conclusion

We have found that, given the state of the law and the record at the time of direct appeal, direct appeal counsel did not act unreasonably in not raising the *Batson* claim, because Petitioner has not shown that the *Batson* claim *clearly* had a better chance of success than issues that counsel did present in the direct appeal. Further, we would not find a *Batson* violation even on the expanded record before us, because no prima facie case has been shown, and the specific reasons given by the prosecutor for exercising some of his peremptory challenges are both race neutral and not pretexts for racial discrimination. Therefore, even if such record had been available to direct appeal counsel, he would not have been ineffective for failing to raise the claim. *Strickland*, 466 U.S. at 691. Each of these reasons is sufficient for us to find that direct appeal counsel's representation of Petitioner was not ineffective when he chose not to and did not raise the *Batson* claim, and we do now make such a finding; therefore Petitioner cannot show cause under *Coleman* to overcome the procedural default that arose as a result of the claim not being raised on direct appeal.

4. Claim IV–Challenges To The Use Of The Statement Purported To Be Petitioner's

Petitioner claims that he was convicted based on a purported statement that he did not actually make, without the benefit of any warning that such a statement could be used against him, despite the lack of any record of the

interrogation at which the purported statement was supposedly made, and despite the fact that the court failed to instruct the jury as to its duty to determine whether any statement was voluntarily made. The heart of Petitioner's defense was that he never waived his right to remain silent, never made a statement regarding the Caldwell murder, and his purported statement was fabricated by the interrogating officer, Detective Gilbert, who based the statement on the prior statement of Shirley Baker. Petitioner alleges further that the Commonwealth created circumstances that deprived him of the means of challenging this alleged confession by the decision of the police that only one officer question him, so that there were no other witnesses; by the failure of the police to make a recording of the interrogation, alleged waiver of rights, and alleged confession; and by the failure of the prosecutor to disclose impeachment evidence in Detective Gilbert's personnel and internal affairs files.

a. Waiver Of Right To Remain Silent

Petitioner first argues that he did not voluntarily waive his right to remain silent. Specifically, he argues that at the suppression hearing, the Commonwealth failed to show that he had been given his *Miranda* warnings, that he waived his rights thereunder, and that any such waiver, if it even occurred, was voluntary, knowing and intelligent. He argues that the trial court therefore erred in ruling that his alleged statement was admissible. This claim was fairly presented to the Pennsylvania Supreme Court on direct appeal and was thus exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). The claim was adjudicated on the merits, therefore we review that court's decision under the AEDPA standard.

Miranda v. Arizona requires that, in order to protect the privilege against self-incrimination, certain warnings be given to persons in custody before they are interrogated by the police, and that the person waive his right to remain silent and to the assistance of an attorney, or else any statement made by the person is inadmissible against him in court. 384 U.S. 436, 478-79 (1966). Whether the warnings were given and whether Petitioner waived his rights are issues of fact, but whether the waiver was voluntarily, knowingly, and intelligently given is an issue of federal constitutional law. *Brewer v. Williams*, 430 U.S. 387, 403 (1977). The government has the burden of establishing the propriety of the waiver. *See id.* at 404 ("[I]t [is] incumbent upon the State to prove an 'intentional relinquishment or abandonment of a known right or privilege.'") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

If the warnings were given and the Petitioner appeared to waive his rights, a court must undertake a two-pronged inquiry to determine whether the waiver was voluntary, knowing and intelligent. First, a court must determine whether the waiver was voluntary "'in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception.'" *United States v. Velasquez*, 885 F.2d 1076, 1084 (3d Cir. 1989) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citation omitted)). Second, a court must determine whether the waiver was "'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Id.* In making this two-pronged inquiry, a court must consider the totality of the circumstances surrounding the interrogation. *Moran*, 475 U.S. at 421 ("Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have

been waived."); *see also United States v. Sriyuth*, 98 F.3d 739, 748-49 (3d Cir. 1996).

In denying Petitioner's motion to suppress his alleged statement, Judge Sabo made factual findings that the defendant had been given his *Miranda* warnings and that he had waived them. (Denial of Motion to Suppress, Findings of Fact & Conclusions of Law, 5/13/86, at 6.) He then reached the legal conclusion that such waiver was voluntary, knowing, and intelligent. (*Id.* at 7-10.) The Pennsylvania Supreme Court, applying its deferential *Lark* standard for reviewing the trial court's decision,[72] concluded that the "record supports the suppression court's finding that the appellant was provided with *Miranda* warnings, voluntarily and intelligently waived his *Miranda* rights, was permitted to consult with his attorney and wife by telephone when requested and was arraigned within six (6) hours of his arrest," and therefore that the admission of his statement was proper. *Holloway I*, 572 A.2d at 691.

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[72] The Pennsylvania Supreme Court employs a standard of review that recognizes that the trial judge, before whom the witnesses actually appear, is in a much better position than the reviewing court to assess the relative credibility of witnesses whose stories are contradictory. "Our responsibility on review is 'to determine whether the record supports the factual findings of the court below and the legitimacy of the inferences and legal conclusions drawn from those findings.'. . . In making this determination, this Court will consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted." *Commonwealth v. Lark*, 477 A.2d 857, 859 (Pa. 1984) (quoting *Commonwealth v. Kichline*, 361 A.2d 282, 290 (1976) (citations omitted)).

We are required to presume the correctness of state court factual findings, and Petitioner may rebut them only upon a showing of clear and convincing evidence. 28 U.S.C. § 2254(e)(1). We may only grant the writ if the state court "decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* (d)(2). Petitioner has failed to make the requisite showing. Judge Sabo credited the testimony of Detective Gilbert instead of that of Petitioner. Detective Gilbert testified that he gave Petitioner his *Miranda* warnings, asked him seven questions to assure that Petitioner understood his rights and waived them, and recorded the answers to the questions, as well as the time that they were asked, on the interview sheet.[73] (N.T. 5/12/86, at 32-36, 39-45.) There is no other evidence that Detective Gilbert

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[73] Detective Gilbert testified that he read the following questions to Petitioner, and Petitioner gave the following replies:

(1) "Do you understand that you have a right to keep quiet and you do not have to say anything at all?" "Yes."

(2) "Do you understand that anything you say, can and will be used against you?" "Yes."

(3) "Do you want to remain silent?" "No."

(4) "Do you understand that you have a right to talk to a lawyer before we ask you any questions?" "Yes."

(5) "Do you understand that if you cannot afford to hire a lawyer, and you want one, we will not ask you any questions until a lawyer is appointed for you free of charge?" "Yes."

(6) "Do you want either to talk with a lawyer, at this time, or have

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warned Petitioner or that Petitioner waived his rights.[74] The only contradictory evidence is Petitioner's own testimony at the suppression hearing, denying that he was warned or that he made a statement.[75] The evidence is, at best, in equipoise;[76] therefore Petitioner has not sustained his burden

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a lawyer with you while we ask you questions?" "No."

(7) "Do you want to answer questions of your own free will, without force or fear and without any threats or promises having been made to you?" "Yes."

(N.T. 5/12/86, at 32-34.)

[74] Detective Graham testified that he read the whole interrogation form back to Petitioner verbatim, without adding any commentary or questions. When he reached the portion dealing with the *Miranda* warnings, he simply read the answers, but not the questions that generated the answers, because it was his job to read only what appeared on the form, and the questions were not on it. *See* note 73, *supra*. Detective Graham also testified that after he finished reading the statement to Petitioner, he acknowledged having made it, but he still refused to sign it. (N.T. 5/13/86 at 18.)

[75] Petitioner testified unconvincingly that he had only recently learned of the requirement of *Miranda* warnings by going to the law library while he was in prison. He claimed that he had never been warned during the course of any of his prior arrests and had never heard of such a thing, even from television. (N.T. 5/13/86, at 50).

[76] Petitioner asserts that certain failures in procedure are evidence that he was not given the warnings and that he did not waive his rights. These include the failure to use a separate form

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to rebut the presumption of the correctness of the state court's factual findings by clear and convincing evidence, and we find that the state court decisions were not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2), (e)(1).

In determining that Petitioner's waiver was voluntarily, knowingly, and intelligently made, Judge Sabo undertook an analysis like that required by *Moran*, 475 U.S. at 421, looking at the totality of the circumstances on the basis of the record established at the suppression hearing and his findings of fact. The Pennsylvania Supreme Court reviewed the facts, using its deferential standard of review as to contradictory evidence resolved by the trial court, and concluded that the

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listing the rights and questions with spaces for a defendant to sign or initial to indicate that he is waiving his rights, and the disappearance of a "chronology" form that would have indicated the occurrence and time thereof of various events during the course of his arrest and interrogation. Neither of these forms is mandatory, however, so we find that the failure of the police to use them or produce them does not aid Petitioner in meeting his evidentiary burden. Petitioner asserts that the fact that he neither initialed the answers to the questions on the interview sheet, nor signed the sheet, indicates that he was never warned and never waived his rights. This evidence is unavailing because it does not help to prove or disprove that Detective Gilbert advised Petitioner of his rights or that Petitioner orally waived them. Petitioner also asserts that his statement is corroborated by the testimony of his wife, Delores Kareem, and of Bernard Wyman, the lawyer he called after the statement was typed by Detective Gilbert. These persons were not present during Petitioner's arrest and interrogation, however, and therefore any knowledge they have would be from the Petitioner's hearsay statements to them, so they can not corroborate his assertions.

trial judge did not err. Although the court did not cite to any legal basis for its conclusion that the waiver was voluntarily, knowingly, and intelligently made, we presume that it used the same basis as the trial court. *See Sistrunk v. Vaughn*, 96 F.3d 666, 674 (3d Cir. 1996). Because this standard was substantially similar to the standard required by the U.S. Supreme Court in *Moran*, we find that the resulting decision was not contrary to federal law that was clearly established at the time of the state court decision. 28 U.S.C. § 2254(d)(1); *Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000) (petitioner must show that "Supreme Court precedent requires an outcome contrary to that reached by the relevant state court").

Neither was the trial court's decision, or the review of it by the Pennsylvania Supreme Court, an unreasonable application of *Moran*. First, the voluntariness of the waiver is not at issue.[77] The record barely hints that the police resorted to physical or psychological pressure to elicit Petitioner's statement; instead, Petitioner claims that he never made the statement.[78] Second, a review of the totality

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[77] See discussion in Part III. C. 4. d., *infra*.

[78] Petitioner testified that when he was brought in for questioning, Detective Gilbert introduced himself as the partner of Detective Gerrard, to whom Petitioner had previously supplied information on unrelated cases. Detective Gilbert then asked for Petitioner's help in providing incriminating information against Leroy "Bubbles" Johnson. (N.T. 5/13/86 at 43-44.) Detective Gilbert did not warn Petitioner of his rights, but nonetheless Petitioner asked to speak to a lawyer, because whenever he had provided information before, he had always done so with the protection of an immunity agreement. (*Id.* at 44-46.) Detective Gilbert, however, simply began to type a document, occasionally asking Petitioner questions about other matters. (*Id.* at 46-47.)

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of the circumstances, as conducted by Judge Sabo, shows that the waiver was made with an awareness of the nature of the right being abandoned and the consequences of the decision to abandon it.

Judge Sabo relied on Detective Gilbert's testimony that he warned Petitioner of his rights, as well as the indication on the interview sheet that Detective Gilbert warned Petitioner of his rights at 11:50 p.m. May 30, 1985. Detective Gilbert then asked Petitioner seven questions designed to ensure that Petitioner understood the rights and was voluntarily, knowingly, and intelligently waiving them. Detective Gilbert recorded Petitioner's answers to the questions on the interview sheet and testified as to the answers at the suppression hearing. (N.T. 5/12/86, at 32-36.) Based on these questions and answers, Detective Gilbert concluded that Petitioner understood his rights, and voluntarily, intelligently, and knowingly waived them, and indicated a willingness to talk. Detective Gilbert then took an oral interview from Petitioner, and thereafter memorialized the statement by typing questions and Petitioner's answers thereto. Judge Sabo also noted that all questioning ceased when Petitioner asked to speak to an attorney. Petitioner subsequently spoke

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Petitioner asked to talk to his wife but was not immediately allowed to telephone her. When Detective Gilbert finished typing the statement, he asked Petitioner to read it, but he refused to do so, fearing that he was being framed, and worried about the possibility of his fingerprints being on the document. (*Id.* at 47.) Petitioner disavowed the statement, and then Detective Gilbert brought in two Detectives who attempted to read the document to Petitioner. He refused to listen to what they were saying, instead chanting loudly to block them out. He again denied having made the statement and refused to sign it. (*Id.* at 48.)

to his wife and to his attorney, and no further questioning took place after these phone calls.

Judge Sabo also considered Petitioner's arguments when looking at the totality of the circumstances. He considered Petitioner's argument that he would not have been inclined to make an inculpatory statement because he knew that Freeman had been acquitted and therefore the government had a weak case. He also considered Petitioner's arguments that Detective Gilbert's failure to use a separate written waiver form, the loss of the chronology, and his refusal to sign the statement cast doubt on the validity of the waiver and show that the statement was involuntary, especially in light of the fact that Petitioner asked to speak with a lawyer. He noted that neither the waiver form nor the chronology are required, however, and that Petitioner's refusal to sign the statement is a factor that should properly be considered by the jury in determining how much weight to give the statement.

Judge Sabo's examination of the totality of the circumstances was sufficiently comprehensive, and the facts it was based upon sufficiently supported by the record, so that his decision, and that of the Pennsylvania Supreme Court in reviewing his decision, were reasonable applications of *Moran*. We therefore find that the state court decisions that Petitioner was warned as required by *Miranda v. Arizona*, and that he voluntarily, knowingly and intelligently waived his right to remain silent, were neither contrary to, nor unreasonable application of, clearly established federal law, and Petitioner may not find relief on this basis.[79]

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[79] Although Petitioner does not allege ineffective assistance of counsel regarding this subclaim specifically, in Claim XV he

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b. Lack Of Audiotaping Or Videotaping Of Alleged Confession

Petitioner argues that the lack of audio- or videotaping of his alleged confession deprived him of due process, effective assistance of counsel, and the heightened reliability required in capital cases, because he was denied the means to challenge the reliability and voluntariness of his alleged confessions. Petitioner raised this issue in his supplemental PCRA brief to the Pennsylvania Supreme Court, as a matter of both state and federal constitutional law, both on the merits and alleging prior counsel's ineffectiveness for failing to raise the claims. Petitioner raised this claim to the PCRA hearing court only in a pro se filing, but it is unclear whether it was or even could have been considered by the PCRA hearing court. We need not decide whether this claim was fairly presented to all levels of the state courts, because even if we were to find these claims to have been exhausted by virtue of being fairly presented, instead of procedurally defaulted, our analysis would not differ. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996).

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alleges that all prior counsel were ineffective to the extent they failed to raise or properly litigate each substantive issue in the Petition. Our review of the state court decisions as to the *Miranda* issue convinces us not only that the state court decisions were reasonable, but also that they were correct. Therefore we would find that any ineffectiveness claim based on this issue would fail because the underlying issue has no merit.

Because the claim was not raised on direct appeal, the Pennsylvania Supreme Court deemed them to be waived.[80] *Commonwealth v. Holloway* (*Holloway II*), 739 A.2d 1039, 1043-44 (Pa. 1999). Because Petitioner alleged ineffectiveness of all prior counsel, however, the court adjudicated the claims from the standpoint of a ineffectiveness claim. *See id.* We must therefore do so as well, applying the AEDPA standard.

The Pennsylvania Supreme Court determined that counsel could not have been ineffective for failing to raise the underlying claim as to the alleged requirement of taping the confession, because no Pennsylvania case had ever required such a recording. Petitioner argues that because the court pointed only to a lack of Pennsylvania cases requiring such recordings, the court did not adjudicate the claim of ineffectiveness of counsel for failure to raise recording issue under a federal due process theory, and thus Petitioner is entitled to de novo review of this claim. We reject this argument. The Pennsylvania Supreme Court of necessity adjudicated a claim of ineffectiveness of counsel, but examined the merits of the underlying claim, because if it had no merit, counsel could not have been ineffective for failing to raise it. *Strickland*, 466 U.S. at 691. In so doing, the court quite

[80] The Supreme Court of Pennsylvania appears to have treated this claim as waived both for a failure to raise the claim at the suppression hearing and for failure to raise it on direct appeal as required by 42 Pa. Cons. Stat. §§ 9543(a)(3) and 9544(b). We have already found that such bases for the waiver are independent and adequate state grounds barring our review of the underlying substantive claim; we now find that each were properly applied by the Pennsylvania Supreme Court as to this claim. Therefore, to review this claim on the merits, we would be required to find cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. *See* Part III. B. 2, *supra*.

properly considered its own law as a guideline for the reasonableness of counsel's actions. In the process of reviewing the Pennsylvania Supreme Court's decision on the ineffectiveness claim for reasonableness under the AEDPA, we find that, under *Arizona v. Youngblood*, the underlying claim does not have arguable merit, therefore counsel cannot have been ineffective for failing to raise it. Therefore we find both that under the AEDPA the Pennsylvania Supreme Court's decision on the ineffectiveness claim was reasonable, and that we would not be able to find cause to excuse the default barring us from considering the underlying claim directly. Thus Petitioner is not entitled to relief on this subclaim.

There are no federal cases requiring the preservation through audiotaping or videotaping of custodial interrogations. The only cases cited by Petitioner deal with the preservation of already existing physical evidence. Therefore we conclude that at the time that Petitioner's direct appeal became final, and even now, there is no clearly established federal law, as determined by the Supreme Court of the United States, that would require such recording.[81] Therefore the decision of the Pennsylvania Supreme Court as to the ineffectiveness of counsel for failing to assert the need for or right to such recording is neither contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254 (d)(1).

In examining this claim to determine whether cause nonetheless exists to excuse Petitioner's default, we are not bound by our previous determination that the Pennsylvania Supreme Court was reasonable when it determined that

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[81] In fact, at the time of Petitioner's statement, it appears that no state required such recording in all cases as a matter of state constitutional law either.

counsel was not ineffective. *See* n.12, *supra*. Nonetheless, we come to the same conclusion as that court, because only by extending the law could the right asserted by Petitioner exist, and even if it were so extended his claim still would not succeed on its facts. Counsel has not acted unreasonably by failing to press a claim for which there is no precedent or no merit. *Strickland*, 466 U.S. at 691 (counsel cannot be ineffective for failing to raise a meritless claim); *cf. Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.").

The Supreme Court precedent finding a right closest to that sought by Petitioner is *Arizona v. Youngblood*, 488 U.S. 51 (1988). In *Youngblood*, the Court held that the failure of police to preserve potentially useful evidence is not a denial of due process of law unless the defendant can show bad faith on part of police. *Youngblood* deals with the preservation of existing evidence, not the creation of evidence, as would be the case of making an audiotape or videotape. Further, Petitioner is unable to show bad faith on the part of the police in failing to make an audio- or videotape of his statement, so the claim lacks even arguable merit.

In *Youngblood*, the Court first explained that the good faith or bad faith of the state is irrelevant under *Brady v. Maryland*, 373 U.S. 83 (1963), i.e. in cases in which the state fails to disclose to the defendant material exculpatory evidence. The Court held, however, that "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood*, 488 U.S. at 57. The Court explained

that part of the reason for the difference is that "'[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.'" *Id.* at 57-58 (quoting *California v. Trombetta*, 467 U.S. 479, 486 (1984)). The Court also explained that it was unwilling to read the Due Process Clause "as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id.* at 58.

Petitioner's entire statement, had it been recorded, was only "potentially useful" evidence. The contents may have contained exculpatory statements, but we cannot ascertain whether that was the case in the absence of an audio- or videotape recording. On the current record, the questions and answered recorded through typing contain no exculpatory evidence; at best they provide some mitigating evidence. Therefore, because we "face the treacherous task of divining the import of [a statement] whose contents are unknown and . . . disputed," the statement is only "potentially useful." *Youngblood*, 488 U.S. at 58 (quoting *Trombetta*, 467 U.S. at 486).

Youngblood requires that the Petitioner show that the police acted in bad faith in failing to preserve his statement in order for the failure to have been a denial of due process. At the time of the statement, it was not the practice of the Philadelphia Police Department to audiotape or videotape confessions. There is no evidence that the lack of such a policy reflected bad faith as against all defendants, to deny them the ability to rebut allegations made by the police or the ability to present a defense. Further, it cannot be said the Petitioner was singled out in any way for treatment that had the effect of denying him the ability to present a defense, even though

Petitioner appears to allege bad faith regarding the conduct of Detective Gilbert. Detective Gilbert interrogated Petitioner without any neutral person present, and indeed without any other police officer present, so that at the suppression hearing the matter was one of the detective's word against that of Petitioner. This argument is specious, because a Detective Graham also testified that he read the statement to Petitioner and that Petitioner acknowledged making the statement, but then refused to sign it. (N.T. 5/19/86, 158-68, 207-11.) Therefore, there was not simply a "swearing contest" between Petitioner and Detective Gilbert.

We find that *Youngblood* is clearly distinguishable from the instant case, because *Youngblood* and its forerunners establish a limited right only to the preservation of *already existing* physical evidence. The creation of evidence through the requirement of audiotaping or videotaping of custodial interrogations and statements cannot be said to be within the protection of *Youngblood*. Even if it were, there is insufficient evidence in this case for us to conclude that the police acted in bad faith in failing to audiotape or videotape Petitioner's statement. Therefore, any claims based on the federal constitution's mandating such recording are completely without merit, and thus we deny them.

c. *Brady* Claim

Petitioner argues that the Commonwealth failed to disclose at trial or during post-conviction proceedings material impeachment information with respect to Detective Gilbert's credibility. In his PCRA appeal to the Pennsylvania Supreme Court, Petitioner alleged that the PCRA trial court erred in denying discovery as to Detective Gilbert's personnel records, thus denying Petitioner due process of law. In the course of this claim, Petitioner alleged that any

information in Detective Gilbert's personnel or internal affairs files that casts doubt on his credibility should have been provided pre-trial, citing *Giglio v. United States*, 405 U.S. 150 (1972). (PCRA Br. Pa. S.Ct. at 59-60). In his Supplemental PCRA Brief, in his claim that he was denied due process because his interrogation was not audiotaped or videotaped, he squarely indicated that discovery was requested in order to develop a claim regarding impeachment material as to Detective Gilbert under *Brady v. Maryland*, 373 U.S. 83 (1963). (Supp. PCRA Br. Pa. S.Ct. at 5 n.4.) In its decision, the Pennsylvania Supreme Court did not refer to the *Brady* claim in finding that the failure to preserve the confession by audiotape or videotape was meritless; nor did it mention the *Brady* claim in deciding that the PCRA court's decision to deny discovery as to Detective Gilbert's personnel or internal affairs files was within its discretion because Petitioner "identifie[d] no specific information that would have been admissible in his case." *Holloway II*, 739 A.2d at 1047. We find that this claim was fairly presented to the PCRA hearing court and the Pennsylvania Supreme Court on PCRA appeal, but it was not adjudicated on the merits by the Pennsylvania Supreme Court, and thus we exercise de novo review. *See Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001); *Hameen v. State of Delaware*, 212 F.3d 226, 248 (3d Cir. 2000). Upon review, we find that there was no *Brady* violation because any evidence that would have been uncovered either would not have been favorable to the Petitioner, or would not have been material.[82]

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[82] It is possible to deduce that, in the course of deciding the due process claim arising from the denial of discovery, the Pennsylvania Supreme Court reasoned that there could have been no *Brady* violation because any evidence that would have been uncovered was inadmissible, and therefore not material and no

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Prosecutors have an affirmative duty to disclose material evidence favorable to defendants, including both exculpatory evidence, *see Brady v. Maryland*, 373 U.S. 83 (1963), and impeachment evidence, *see United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; *see also Strickler v. Greene*, 527 U.S. 263, 289 (1999). The prosecution is only "obligated to produce certain evidence actually or constructively in its possession or accessible to it." *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (imputing knowledge known by any member of the "prosecution team" to the prosecutor); *see also Hollman v. Wilson*, 158 F.3d 177, 180 (3d Cir. 1998), because evidence not within this category logically could not have been suppressed. Knowledge of one member of the prosecutor's office will be imputed to the whole office. *See Giglio v. United States*, (deciding this issue with respect to the U.S. Attorney's office); *see also, e.g., Mattis v. Vaughn*, 128 F. Supp. 2d 249 (E.D. Pa. 2001) (applying *Giglio* to members of the Philadelphia District Attorney's Office). The knowledge of a police officer investigating a crime is also imputed to the prosecutor because "the prosecutor has a duty to learn of any favorable

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prejudice could have resulted. If we were to make this deduction, we would find that the *Brady* claim was adjudicated on the merits and review the decision of the Pennsylvania Supreme Court under the AEDPA standard. Were we to do so, we would conclude that the decision was a reasonable application of *Brady* and its Supreme Court progeny, because there was no *Brady* violation in this case.

evidence known to the others acting on the government's behalf in the case." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

The Third Circuit has not spoken as to whether police personnel and internal affairs files are considered evidence that is in the constructive possession of the prosecutor or accessible to him; *see Perdomo*, 929 F.2d at 970, thus requiring that any information in such files that could impeach a police officer testifying in a certain case be disclosed to defense counsel. In *Perdomo*, the court made clear that "non-disclosure is inexcusable where the prosecution has not sought out information readily available to it. . . . [T]he availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state." 929 F.2d at 971. The court held that the U.S. Attorney had a duty to search local Virgin Islands criminal records to determine whether its witness had a criminal record, which would have been impeachment evidence.

Subsequently, in *United States v. Joseph*, the Third Circuit clarified that "constructive possession" means "that although a prosecutor has no actual knowledge, he should nevertheless have known that the material at issue was in existence." *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993). The court refused to "interpret *Brady* to require prosecutors to search their unrelated files to exclude the possibility, however remote, that they contain exculpatory information." *Id.* at 41. Instead, the Third Circuit held that when prosecutor has neither actual knowledge nor "cause to know of the existence of *Brady* material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information--specific in the sense that it

explicitly identifies the desired material and is objectively limited in scope." *Id.*

In the case of police personnel and private internal affairs records,[83] we believe that the duty to disclose should be governed by the "constructive possession" standard of *Joseph*, because such files are unrelated to the substantive case file. Under *Joseph*, if the prosecutor had no reason to know of *Brady* material in the personnel or internal affairs files,[84] he would have a duty to examine them only if the

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[83] Such records are often protected by law and policy.

[84] None of the evidence cited by the Petitioner now and before the Pennsylvania Supreme Court shows that the prosecutor should have known that Detective Gilbert's personnel files contained *Brady* material. This evidence was either not in existence at the time of Petitioner's trial, or it is unreasonable to expect it to have been in Detective Gilbert's personnel file, and thus available to the prosecutor. The affidavits from others who had dealings with Detective Gilbert allege misconduct by Detective Gilbert as early as 1983, but none of the affidavits were made before Petitioner's trial, nor even by the time his appeal became final. (Pet. Apps. 17-22). Petitioner also refers to extensive testimony taken in 1997 in the case of *Commonwealth v. Harvey*, Nos. 0305, 0309 & 0314, July Term, 1983 (Phila C.P.), on the subject of allegations of misconduct raised in several of these affidavits. Clearly, such testimony could not contain impeachment evidence available to the prosecutor in 1986. We must also note that the improper conduct of Detective Gilbert made public in *Commonwealth v. Lester*, 572 A.2d 694, 696-97 (Pa. Super. Ct. 1990), well after Petitioner's trial, as well as alleged in some of the affidavits before us, that he allowed prisoners to have conjugal visits in return for their cooperation or confessions may be reprehensible, but it would not have been admissible to impeach his credibility. Neither such misconduct, nor allegations of physical abuse, are relevant to the issue of Detective Gilbert's truthfulness.

defendant made a specific request, and the record does not reveal that a specific request was made in this case. Even if we were to conclude, however, that the duty to examine such records is more properly governed by the "readily available" standard of *Perdomo*, because "the information is in the possession of some arm of the state," *Perdomo*, 929 F.2d at 971, that is "closely aligned with the prosecution," *Joseph*, 996 F.2d at 41 (explaining the *Perdomo* holding), Petitioner's argument lacks merit.

Based on the record before us, it is not clear whether the prosecutor examined such records. Even if he did not conduct such a search, and therefore failed to turn over material exculpatory and impeachment evidence to the defense, we conclude that there has been no *Brady* violation in this case.

Both the Petitioner and the Commonwealth failed to mention in their filings related to the Petition before us that all internal police department files on Detective Gilbert were reviewed *in camera* by Hon. Joseph I. Papalini of the Court of Common Pleas in 1992 before he denied Petitioner's motion for discovery of such files, concluding that there was no material exculpatory or impeachment evidence contained therein.[85] At a PCRA hearing held for the purpose of determining whether Judge Papalini would order that the city solicitor allow Petitioner's counsel to examine such records, the city solicitor looked through the files and indicated that there were several complaints against or investigations of Detective Gilbert. The city solicitor, a prosecutor, and Petitioner's counsel agreed that Judge Papalini should first

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[85] Such review excuses the prosecutor from his duty to review such records to determine whether they contained *Brady* material.

examine such records *in camera* so that he could properly decide whether the records themselves, or information contained therein, should be disclosed. Judge Papalini explained that he would search such files to determine whether there were any complaints or investigations that would shed light on Detective Gilbert's credibility, i.e. that he would look for any evidence that would bolster the Petitioner's argument that Detective Gilbert "lied and made up a statement." (PCRA Status Hrg., N.T. 10/30/92, at 21.) Petitioner and other persons had made allegations of fabrication of statements or of physical abuse, or both. Judge Papalini indicated that physical abuse was irrelevant, but that anything about Detective Gilbert's fabricating statements was relevant. (*Id.* at 21-27.) In addition, Detective Gilbert may have been in violation of a residency requirement and lied about his residence. The evidence showed that he sold his house in Philadelphia in 1987, but it was unknown when he moved out of Philadelphia, just that sometime in 1988 it was established that he was living in New Jersey. Judge Papalini agreed to review the files for evidence that Detective Gilbert lied about the location of his residence before Petitioner's trial. He also agreed to provide Petitioner's counsel with the names of anyone who alleged untruthfulness by Detective Gilbert so that Petitioner's counsel could independently investigate such allegations.

Judge Papalini reviewed the personnel and internal affairs files and announced his findings of fact and conclusions of law during a status hearing on December 15, 1992. He stated that he had "reviewed the file with the city solicitor's office and the information that is contained in there would not be very relevant to [Petitioner's] inquiry. I checked it all through and there isn't anything in there that would be of substantial interest to your client." (PCRA Status Hrg., N.T. Dec. 15, 1992, at 2.). Based on this

examination of the evidence and finding of facts, Judge Papalini quashed Petitioner's subpoena for the personnel records. (*Id.* at 3.)

Read alone, Judge Papalini's statements on December 15 could be construed merely as a conclusion of law as to the materiality of any evidence contained in the personnel files. However, reading his statement in conjunction with his stated purpose in reviewing the files, and his agreement to disclose the names of anyone who alleged that Detective Gilbert made false statements, we conclude that he also made the finding of fact that the records revealed nothing that adversely impacted Detective Gilbert's credibility.

We must presume that Judge Papalini's factual findings as to the contents of the personnel records are correct. *See* 28 U.S.C. § 2254(e)(1). Petitioner may only overcome that presumption by clear and convincing evidence. *See id.* The evidence cited by Petitioner does not assist him, as it was not in existence at the time of his trial. In fact, none of the affidavits were in existence at the time of the hearing, either. The only evidence now before us that could have been presented to Judge Papalini, but was not, was the *Lester* case, and although that case indicates that Detective Gilbert may have engaged in misconduct, that misconduct does not implicate his truthfulness.[86] *Commonwealth v. Lester*, 572 A.2d 694, 696-97 (Pa. Super. Ct. 1990). Therefore, Petitioner has not shown by clear and convincing evidence that

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[86] *Lester* does not use the first name of Detective Gilbert. However, a Detective Lawrence Gerrard testified in the case, and the testimony in the instant case indicates that a Detective Lawrence Gerrard was Detective Ernest Gilbert's partner. Therefore we deduce that the Detective Gilbert referred to in *Lester* is Detective Ernest Gilbert.

Judge Papalini erred in making his factual findings about the contents of Detective Gilbert's files. Thus, we find that there was no evidence in them that the prosecutor would have been obligated to disclose under *Brady* had he examined them, and we deny this claim.[87]

d. Jury Instructions

Petitioner argues that the trial court's instructions to the jury concerning the requirements of *Miranda v. Arizona* were prejudicially inadequate, in that the jury was instructed only to find whether Petitioner had been warned, but not instructed that it was required under Pennsylvania law to determine whether the Petitioner voluntarily, knowingly and intelligently waived his rights, and thus the failure to instruct violated Petitioner's due process rights under the Fourteenth Amendment. Petitioner also argues that the trial judge completely failed to instruct the jury on the voluntariness of the confession, likewise violating Petitioner's due process rights. Finally, Petitioner argues that trial counsel was ineffective for failing to object or offer an appropriate instruction.

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[87] In light of the foregoing analysis and conclusions, it would be improper and unnecessary to disturb our order of August 7, 2000, denying discovery as to Detective Gilbert's personnel and internal affairs files or other documentation in the actual or constructive possession of the Commonwealth regarding Detective Gilbert's credibility, because Petitioner has not shown "good cause" for such an order of discovery as required by Rule 6(a) of the Federal Rules Governing Section 2254 Cases.

(1) Instruction On Voluntariness Of Petitioner's Statement

Petitioner's claims that the trial court erred in failing to instruct the jury that it could not consider appellant's purported statement against him unless it found that he gave the statement voluntarily, and that trial counsel was ineffective for failing to object or offer an appropriate instruction, were raised to the PCRA hearing court and in the initial PCRA brief. We therefore find that they were fairly presented to the state courts and were are thus exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). Because they had not been raised on direct appeal, the Pennsylvania Supreme Court deemed them waived under both the contemporaneous objection requirement and the PCRA's procedural rules. *Holloway II*, 739 A.2d at 1044. Because Petitioner alleged ineffectiveness of all prior counsel, however, the court adjudicated the claims from the standpoint of an ineffectiveness claim. *See id.* We have already determined that the two waiver rules relied on by the Pennsylvania Supreme Court are independent and adequate state grounds that bar our review of such waived claims absent a showing of cause and prejudice, *see* Part III. B. 2., *supra*, and we now find that they were correctly applied to this subclaim. We therefore apply the AEDPA standard in reviewing the court's decision as to counsel's ineffectiveness for failing to raise the underlying claims previously, and we can only examine the underlying claims if cause and prejudice are shown to excuse the default.

Our AEDPA review consists of determining whether the Pennsylvania Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), or whether its decision was contrary to *Strickland*, when it decided that appellate counsel's failure to argue the following claims were

neither unreasonable nor prejudiced Petitioner: (1) the trial court failed to properly instruct the jury that if it found that Petitioner in fact made a statement, it was required under Pennsylvania law to determine whether he had voluntarily done so, thus violating Petitioner's due process rights under the Fourteenth Amendment by failing to so instruct; and (2) trial counsel was ineffective for failing to request such an instruction. The Pennsylvania Supreme Court found that the underlying claims had no merit, explaining that

> Such an instruction would have been inconsistent with Appellant's claim that he never gave any statement to police; therefore, it was reasonable for trial counsel not to request the instruction. Moreover, there was no evidence that the police coerced Appellant in any way. Finally, Appellant cannot demonstrate that the absence of the instruction affected the outcome of the trial. Consequently, this claim warrants no relief.

Holloway II, 739 A.2d at 1047. Because we agree that these underlying claims lack merit,[88] counsel cannot have been ineffective for failing to raise them, *Strickland*, 466 U.S. at 691, and thus we find the Pennsylvania Supreme Court's decision to be neither contrary to, nor an unreasonable application of, *Strickland*, and not based on an unreasonable

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[88] We need not examine all of the reasons given by the Pennsylvania Supreme Court for its decision. We agree that there was no evidence of coercion, and therefore that there was no right to such a jury instruction and the absence of such an instruction could not have affected the outcome of the trial in any way, and certainly not so that there is a reasonable probability that the outcome would have been different if there had been an instruction.

determination of the facts in light of the evidence presented.[89] 28 U.S.C. § 2254(d)(1) & (2).

As a matter of substantive federal law, a defendant is not necessarily entitled to a jury determination of voluntariness in cases such as the one before us in which the trial court denied such a claim before trial. *See Lego v. Twomey*, 404 U.S. 477, 489-90 (1972). On direct appeal, the Pennsylvania Supreme Court affirmed the trial court's determination on voluntariness. Petitioner can only succeed if, as he claims, he had a right to a jury instruction on the voluntariness of his confession as a matter of state law, and the denial of that right denied him due process under the Fourteenth Amendment.

Petitioner cites two cases for the proposition that he had a right to the jury determination on voluntariness under Pennsylvania law. *See Commonwealth v. Cunningham*, 370 A.2d 1172, 1179 (Pa. 1977); *Commonwealth v. Coach*, 370 A.2d 358, 361 (1977). This right gives defendants a second chance to test the voluntariness of their statements that had been ruled admissible by the trial judge. This right does not require the trial judge to instruct the jury on voluntariness in every case, however. Rather, "under this approach, the defendant is permitted to introduce evidence at trial relating to the voluntariness of a challenged statement. When a jury is so confronted it may not assess the evidentiary weight to be given to the evidence until it first makes an independent finding that the confession was voluntarily made." *Cunningham*, 370 A.2d at 1179. The Pennsylvania Supreme Court has repeatedly explained that defendants are only entitled to

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[89] Because the underlying claims lack merit, we need not further consider whether Petitioner's procedural default could have been overcome.

jury instructions if the evidence presented at trial supports such an instruction. *See, e.g., Commonwealth v. Holland*, 543 A.2d 1068, 1071-72 (Pa. 1988) (finding that there "must be some relationship between the law upon which an instruction is required and the evidence presented at trial," and concluding that "there was no basis in the record to support charging the jury on the voluntariness of [Petitioner's] confessions"). Therefore we must determine whether Petitioner adduced sufficient evidence at trial to be entitled to a jury instruction on voluntariness, assessing the Pennsylvania Supreme Court's decision that "there was no evidence that the police coerced Appellant in any way," *Holloway II*, 739 A.2d at 1047, for reasonableness under the AEDPA. 28 U.S.C. § 2254(d)(1) & (2).

The evidence asserted both on PCRA appeal and before us is so paltry that we would be extremely hard pressed to conclude that voluntariness was at issue. There is absolutely no evidence of physical coercion in the record. The record barely hints that the police resorted to any psychological pressure. Petitioner testified that Detective Gilbert informed him that Johnson had a contract out on Petitioner's life when he asked for Petitioner's help in implicating Johnson in the Caldwell murder. (N.T. 5/20/86 at 104-06.) Petitioner characterizes this as a "veiled threat" to coerce him to confess. (Pet. Mem. L. at 42.) We fail to see how that information could have affected Petitioner, because he admitted to knowing of the contract already, and it did not cause him to voluntarily present himself to the police to implicate Johnson, and thus attempt to remove Johnson from the streets and protect himself. Petitioner also makes a vague argument that if he made a statement it was in response to a promise that the police would help him if he implicated Johnson, but Petitioner points to not a shred of evidence of such an inducement. (Pet. Mem. L. at 42-43.) We are similarly

unconvinced by any of Petitioner's other assertions that purport to show that his statement was not voluntary,[90] and we therefore find that he was not entitled to an instruction on the voluntariness of his confession. Thus we find that neither his due process claim nor his ineffectiveness of counsel claims have merit and that the decision of the Pennsylvania Supreme Court was both reasonable and based on a reasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1) & (2).

(2) Instruction On Waiver Of *Miranda* Rights

Petitioner's claims as to the faulty *Miranda* instruction were raised his the Supplemental PCRA brief. In its PCRA decision, however, the Pennsylvania Supreme Court asserted that it had addressed these claims on direct appeal, and therefore refused to consider them again. *Holloway II*, 739 A.2d at 1043-44. On direct appeal, however, the only issues regarding the statement dealt with whether the suppression court had properly admitted the statement into evidence. During the course of this review, the Pennsylvania Supreme Court found that the suppression court had properly

[90] According to Petitioner, "the jury was well aware that Shirley Baker had given a statement and testified with the expectation that her cooperation would be to her benefit." Further, "Petitioner was unwilling to sign a statement until he could talk to an attorney, [and after he did so he] refused to sign the statement." We fail to understand the relevance of these statements. Finally, he argues that because the chronology was missing, he was entitled to an instruction that the jury should consider any unnecessary delay in arraignment in determining voluntariness. There was, however, other evidence as to the time that elapsed between his arrest and arraignment–less than six hours–so Petitioner would not have been entitled to such an instruction on this basis.

found that the Petitioner had voluntarily, knowingly, and intelligently waived his *Miranda* rights, but there was no consideration of the trial court's instruction to the jury as to this issue. Because the issue as to the jury instruction was never raised on direct appeal, we respectfully find that neither the due process claim as to the faulty *Miranda* instruction, nor the ineffective assistance of trial counsel claim for failure to request such an instruction, was adjudicated on the merits by the Pennsylvania Supreme Court in either *Holloway I* or *Holloway II*. In *Holloway II*, the court did not cite an independent and adequate state ground that would bar review, as it did with the voluntariness claims. Instead, it cited a ground that would have been adequate, had the court been correct in asserting that it had decided the claim previously. But because we respectfully find that the court was not correct in asserting this, we also find that the ground for failing to adjudicate the claim on PCRA review was inadequate. Therefore we examine these claims de novo without requiring that cause and prejudice be shown for the failure of direct appeal counsel or PCRA trial counsel to raise these claims.

Petitioner derives no advantage from our exercise of plenary review, however, because his claims are completely meritless. Petitioner points to no cases that indicate that he has a right to a jury determination of whether his waiver of *Miranda* rights was voluntary, knowing, and intelligent. He only points to cases that deal with his right to present evidence to the jury as to whether the statement was made voluntarily. (Pet. Mem. L. at 39.) Therefore, his argument that his due process rights were violated because he was denied his right to a jury determination on the *Miranda* waiver is without merit, because he has not proved that such an underlying right exists. Because there is no such right, counsel cannot have been ineffective for failing to assert it. *See*

Strickland, 466 U.S. at 691. We therefore deny the claims based on the failure of the trial court to instruct on the *Miranda* waiver issue and counsel's ineffectiveness in failing to request such an instruction.

5. Claim V–Shirley Baker's Secretly Biased And False Testimony

Petitioner claims that the prosecution suppressed impeachment evidence concerning a deal it had made with its key witness, Shirley Baker, violating his rights under the Sixth, Eighth, and Fourteenth Amendments, as articulated by *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Petitioner asserts that he is entitled to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293 (1963), to develop this claim. Petitioner also claims that the prosecution's failure to correct false testimony given by Baker concerning her prior arrest record violated his Fourteenth Amendment right to due process. Finally, Petitioner claims that during closing arguments, the prosecutor improperly vouched for Baker's veracity in order to bolster her credibility (N.T. 5/21/86 at 41-43, 60-63).

Petitioner raised the issues of the alleged deal and the failure to correct false testimony in his filings to the PCRA hearing court and in his initial PCRA brief before the Pennsylvania Supreme Court, and we find them to have been fairly presented, and thus exhausted.[91] *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). Because these issues were not raised previously, however, the Supreme Court of

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[91] Petitioner has made no argument to us regarding the alleged Eighth Amendment violation, and therefore we deem such a claim to be waived.

Pennsylvania deemed them to be waived. *Commonwealth v. Holloway* (*Holloway II*), 739 A.2d 1039, 1044-45 (Pa. 1999). Because Petitioner alleged ineffectiveness of all prior counsel, however, the court indicated that it would adjudicate these claims from the standpoint of ineffectiveness claims. *See id.*

We have already found that 42 Pa. Cons. Stat. §§ 9543(a)(3) and 9544(b) are independent and adequate state grounds that bar federal review of claims that are deemed waived based on those rules. We now find these rules to have been properly applied to this subclaim. Therefore, to review these two subclaims on the merits, we would be required to find cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. *See* Part III. B. 2, *supra*.

As to the first, then, we apply the AEDPA to the claim of ineffective assistance of counsel, because that was the claim adjudicated by the Pennsylvania Supreme Court. As to the second, the uncorrected false testimony, the court clearly applied the procedural bar, but it appears never to have addressed the ineffectiveness claim based on it. *Holloway II*, 739 A.2d at 1042, 1044, 1046. Therefore there appears to be no adjudication on the merits of the ineffectiveness claim that we would review under the AEDPA, but we are still bound by the procedural bar, and may address the subclaim on the merits only if the procedural default can be overcome.

The third subclaim, the prosecutor's improper vouching for Baker's veracity, appears to have been raised for the first time in Petitioner's Memorandum of Law in support of his federal habeas petition. This claim is therefore exhausted by operation of 42 Pa. Cons. Stat. § 9545, and is procedurally

defaulted. *See* Part III. A & B.2., *supra*. Therefore, we may only examine this subclaim on its merits if there is cause and prejudice to excuse the default.

a. *Brady* Claim

In adjudicating the claim that direct appeal counsel was ineffective for failing to raise the *Brady* claim, the Pennsylvania Supreme Court decided that Petitioner's *Brady* claim as to the deal had no merit, because the Petitioner failed to present any evidence to substantiate this claim. *See Holloway II*, 739 A.2d at 1046 ("This claim is based on pure conjecture, as Appellant presents absolutely no evidence of such a 'deal.'"). By making this determination, the court concluded that the ineffectiveness claim did not entitle Petitioner to relief, because counsel cannot be ineffective for failing to raise a meritless claim. *See Strickland*, 466 U.S. at 691; *Holloway II*, 739 A.2d at 1046. We agree that the underlying *Brady* claim has no merit, and therefore we also agree that the *Strickland* claim has no merit, and thus we find under the AEDPA that the Pennsylvania Supreme Court's adjudication of the ineffectiveness claim was not an unreasonable application of, or contrary to, Supreme Court precedent.[92]

The Petitioner asserts that a deal existed between the prosecution and Baker for her testimony, and that withholding evidence of this deal from Petitioner was a violation of his Fourteenth Amendment right to due process, because the prosecution has a duty to disclose all exculpatory information and evidence that could be used to impeach the credibility of

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[92] We therefore need not consider whether Petitioner could have overcome the procedural default that bars us from deciding the *Brady* claim on the merits.

the prosecution's witnesses. *See Brady v. Maryland*, 373 U.S. 83 (1963) (prosecutors have an affirmative duty to disclose material exculpatory evidence to defendants); *United States v. Bagley*, 473. U.S. 667, 676 (1985) (same as to material impeachment evidence). The Petitioner alleges that the prosecution and Baker had a deal such that "she was guaranteed to receive an extremely lenient sentence if she testified consistently with her statement, but that if she deviated from it the Commonwealth would be free to pursue a heavy sentence." (Pet. Mem. L. at 46). He deduces that a deal must have existed, because after Baker testified for the prosecution, Baker only received time served–six months--and non-reporting parole for six drug related arrests that carried a maximum of 60 to 120 years of prison time. The Petitioner claims that these facts show a prima facie case that a de facto deal existed, and that the prosecution was required to disclose it.

We agree with the Pennsylvania Supreme Court that the *Brady* claim underlying a claim of ineffective assistance of counsel has no merit, because the claim is based on raw speculation. Not only is there no evidence that a deal of the type asserted by Petitioner existed, Baker repeatedly denied it. Instead, Baker testified that the deal was that she would testify truthfully, and the prosecution would then tell her sentencing judge that she cooperated in that way. She hoped thereby to get a more lenient sentence, but she expressly denied that anything specific had been promised to her or that she should do anything other than testify truthfully. (N.T. 5/19/86 at 135-41.) Further, at her sentencing, Baker's counsel disclosed to the sentencing court the fact of her cooperation in Petitioner's case, and the prosecutor confirmed that fact, and made no sentencing recommendation. No other deal was disclosed to the sentencing judge. (N.T. 9/7/86, 4, 6; Commonwealth v. Shirley Baker, No. 2556, October Term

1982, No. 1915, March Term 1983, No. 2522, April Term, 1983.). We therefore find that the Pennsylvania Supreme Court's determination that the underlying *Brady* claim had no merit was a reasonable one under both § 2254(d)(1) and (d)(2).

Even if there had been a deal of the type asserted, we would not find prejudice in this case. There is constitutional error only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. In this case, Baker was extensively examined and cross-examined about the drug charges on which she had pled guilty, but had not yet been sentenced, and on the penalties she faced. Defense counsel diligently insinuated that the deal she had was not to testify truthfully, but to testify so as to convict Petitioner. He implied that because she had not yet been sentenced, her ultimate sentence would be lower if Petitioner were convicted than if he were acquitted. Defense counsel's extensive effort to impeach Baker's credibility leads us to believe that even if there had been some type of a deal, other than the one disclosed at trial, there is not a reasonable probability that the jury would have weighed Baker's credibility so differently so as to alter the outcome of the trial.

Thus, because there is no evidence at all that the prosecution had a deal with Baker like that asserted by Petitioner,[93] and even if there were, there would be no prejudice, we find that the Pennsylvania Supreme Court's decision was reasonable; there is no basis for our granting an evidentiary

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[93] There is therefore no evidence that the Commonwealth allowed Baker to testify falsely as to the nature of the deal, and we reject any claims based thereon.

hearing or ordering discovery on the procedurally defaulted *Brady* claim; and Petitioner is not entitled to habeas relief based on the *Brady* claim. We therefore will deny relief as to this subclaim.

b. False Testimony Claim

Petitioner also claims that the prosecution's failure to correct false testimony given by Baker concerning her arrest record violated his Fourteenth Amendment right to due process. According to Petitioner, Baker testified falsely under examination by the Commonwealth on redirect that she had never been arrested prior to her arrests on the open drug cases on which she had pled guilty and was awaiting sentencing. He alleges that in fact, in addition to these open cases, Baker had two prior arrests for selling drugs and a prior conviction for possession. Petitioner asserts that the Commonwealth knew of these other incidents, or is presumed to know of them, and it had a duty to correct this false testimony. Petitioner acknowledges that the prior incidents themselves would not have been admissible, had he sought to introduce them as impeachment evidence, because they were not *crimen falsi*. He argues instead that the fact that Baker lied about the existence of such incidents impugns her credibility, and the Commonwealth should not be allowed to benefit from this false testimony.

The rule of *Brady v. Maryland*, 373 U.S. 83 (1963), applies to the discovery, after trial, of information that had been known to the prosecution but unknown to the defense. *See United States v. Agurs*, 427 U.S. 97, 103 (1976). The Court in *Agurs* explained that the *Brady* rule applies when the "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Id.*; *see*

also Napue v. Illinois, 360 U.S. 264, 269 (1959) (even if the prosecution has not solicited false evidence it may not allow it to go uncorrected when it appears). However, the prejudice requirement is different: "a conviction obtained by the knowing use of perjured testimony . . . must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959))).

Concurring in *Strickler v. Greene*, Justice Souter explained that the "reasonable likelihood" prejudice standard used in perjured testimony cases has been treated by the Court as "synonymous with 'reasonable possibility' and thus [the Court has] equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt." 527 U.S. 263, 299 (Souter, J., concurring) (citing *Bagley*, 473 U.S. at 678-680, and n. 9 (opinion of Blackmun, J.); *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (defining harmless-beyond-a-reasonable-doubt standard as no " 'reasonable possibility' that trial error contributed to the verdict"); *Chapman v. California*, 386 U.S. 18, 24 (1967) (same)). Therefore, it appears that the prosecution's failure to correct testimony that it should have known was false would entitle a defendant to relief unless there is no "reasonable possibility" that the trial error contributed to the verdict.

We need not decide whether Petitioner would be entitled to relief under this showing of prejudice.[94] This

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[94] We are troubled by the fact that Petitioner repeatedly refers to the standard to be applied as "any likelihood" that the false testimony could have affected the judgment of the jury,

(Continued)

claim is procedurally defaulted by virtue of its not having been raised on direct appeal. Before we could ever reach the *Napue* showing of prejudice Petitioner must satisfy the greater burden of showing actual prejudice, which requires that the petitioner "shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). *See* Part III. B. 2, *supra*.

Further, in order to show cause for the default, he would have to show that counsel was ineffective for not raising the claim on direct appeal,[95] requiring a showing of cause and prejudice under *Strickland*. Petitioner cannot show cause, because the underlying claim does not have merit. *Strickland*, 466 U.S. at 691. It appears that, even though the Commonwealth has not contested the issue before us on the

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(Continued)

instead of "any reasonable likelihood." (Pet. Mem. L. at 45; Pet. Reply Mem. at 77.) There is a considerable difference in these two standards: "any likelihood" is essentially a per se prejudice standard upon a showing that false testimony was used.

[95] Petitioner asserts that his "state court counsel were ineffective to the extent that they failed to raise and litigate this claim," (Pet. at 41), but does not otherwise attempt to demonstrate or argue cause. As we explained *supra*, Part III. C. 3. e. (2) (b), in evaluating whether direct appeal counsel was unreasonable for failing to raise the *Batson* claim, it is very difficult for a petitioner to show that his appellate counsel was ineffective for failing to assert a claim, *see Smith v. Robbins*, 528 U.S. 259, 288 (2000), because it is important to weed out weaker arguments and focus on, at most, a few key issues, *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

merits, Baker did not testify falsely, or at least not perjuriously, or at such a level of falsity that the prosecutor should have known that the testimony was false.

Baker's testimony on the number of her arrests, when they occurred, and which ones were open is quite confusing. (N.T. 5/19/86 at 97-106; 134-35.) On cross-examination she was extensively questioned by defense counsel as to her arrests and open cases, and the questioning indicated that defense counsel had her arrest record in his possession. She testified that she had six open cases, and he asked whether she really had eight open. (N.T. 5/19/86, at 97.) She did not seem able to recall exactly when the arrests occurred–just sometime in 1982 or 1983–or which ones were the result of sales to which under cover police officer. (*Id.* at 103.) Defense counsel then probed, asking "In fact, it involves the year, 1982, June, January, March, April and August?," and Baker confirmed that. (*Id.* at 104-105.)

Petitioner claims that on redirect, when the prosecutor asked Baker about the open cases, specifically asking, "Were there any other cases that you had other than cases for selling drugs?," Baker answered falsely with the statement "I never been arrested before. I never even got suspended from school. I never got arrested before. This is my first time being arrested by dealing drugs for them." (*Id.* at 134-35.) It is not clear that Baker testified falsely. She may have testified accurately, or she may have been confused about exactly what the prosecutor was asking. Petitioner does not analyze Baker's arrest record and explain which of her convictions were supposed to have been open at the time of trial, but a comparison of her record to the notes of testimony from her sentencing indicate that the open cases were the arrests from March, April, and June of 1982. The January arrests are indeed prior to these, but because defense counsel mentioned

the January cases as among the open ones, and Baker confirmed, and because she testified that her arrests were for selling drugs for Petitioner and Johnson, it is not clear that she in fact testified falsely.

Therefore, because Baker does not appear to have in fact testified falsely, and even if she did, it would not be so apparent that no reasonable attorney would have failed to raise the claim, we find that direct appeal counsel did not act unreasonably in not raising it. Therefore direct appeal counsel was not ineffective, and cause cannot be shown to excuse the procedural default. We will therefore deny relief as to this subclaim.

c. Improper Vouching Claim

Petitioner argues that during closing arguments, the prosecutor improperly vouched for Ms. Baker's veracity in order to bolster her credibility. Petitioner's presentation of this subclaim is confusing. It is related to the previous two, in that such bolstering, if impermissible, exacerbated both the alleged *Brady* violation and the impact of the false testimony, and Petitioner argues that the Commonwealth should not be allowed to benefit therefrom. However, Petitioner also bases this subclaim on the legal theory that a prosecutor's assurances of a witness's veracity violate the defendant's rights to due process and a fair trial. If this claim is merely an extension of the other two, we dismiss it outright, because it does not alter our conclusions as to the previous two claims. We believe, however, that this argument was intended to be a separate subclaim. Because the facts and legal theory it is based upon were never presented to the state courts, we deem it exhausted because it could not be raised there now, *see* 42 Pa. Cons. Stat. 9545, and thus procedurally defaulted, requiring a showing of cause for and actual prejudice from the

failure to raise it previously, before we would be able to grant relief on the merits, if such relief were warranted.

Such relief would not be warranted, because this claim has no merit. We must examine the comments of the prosecutor in the context of the trial as a whole to determine whether there was error. *See Donelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). If the alleged misconduct was indeed error, the court must determine if the error so infected the trial as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987). Petitioner complains of the prosecutor's repeatedly referring to the deal with Shirley Baker as one for "truthful testimony," citing five instances of such remarks. He asserts that these statements imply "that the prosecutor has ways of determining whether the witness is telling the truth, and that the prosecutor had in fact determined that she is telling the truth. Accordingly, it constitutes improper vouching." (Pet. Reply Mem. at 77.) Such remarks are not error. First, they are permissible comments on the evidence adduced at trial, i.e. Baker's testimony that the deal was that she would testify truthfully, and the prosecution would tell her sentencing judge of that fact. Second, they were an attempt to mitigate defense counsel's effort to discredit that evidence on cross-examination. Third, they were also a fair response to defense counsel's closing argument implying that Baker expected much more from her deal than she was admitting. *See United States v. Robinson*, 485 U.S. 25, 32 (1988); (N.T. 5/21/86 at 25-26).

Because this subclaim has no merit, we would not grant relief, even if we could examine it directly on the merits.

6. Claim VI–Ineffectiveness Of Trial Counsel During The Guilt Phase

Petitioner claims that trial counsel was ineffective at the guilt phase for several reasons. First, he argues that counsel was ineffective for failing to investigate, prepare, and present substantial evidence that was available to cast doubt upon the testimony of prosecution witness Shirley Baker. Second, he argues that counsel was ineffective for failing to call Daniel Freeman as a witness to support his alibi defense, and to show that he was acquitted of the Caldwell homicide. Third, he argues that counsel rendered ineffective assistance when he failed to challenge the unsigned statement attributed to Petitioner as the fruit of an illegal arrest.

a. Failure To Investigate, Prepare, And Present Substantial Evidence Available To Impeach The Testimony Of Shirley Baker

Petitioner claims that there were numerous methods available of impeaching Shirley Baker, and trial counsel failed to attempt to do so with any of them. These methods include (1) using evidence of Freeman's acquittal to impeach Baker; (2) showing that Baker could not have seen the victim inside the van belonging to Johnson; (3) showing that from her stated position in her apartment, she could not have seen Petitioner and Freeman get inside the van; (4) showing that Baker had a history of animosity toward Petitioner, and therefore was biased against him, as a result of Petitioner's ending an intimate relationship with her because of her drug addiction and lack of trustworthiness; (5) presenting evidence that if the shotgun had gone off inside Freeman's pants leg, the result would have been much more severe than "a white

spot" on the pants, and (6) impeachment with inconsistent testimony from Freeman's trial.

This subclaim was raised to the PCRA hearing court and to the Pennsylvania Supreme Court on PCRA appeal.[96] Because this issue was not raised previously, the Supreme Court of Pennsylvania deemed it to be waived. *Commonwealth v. Holloway* (*Holloway II*), 739 A.2d 1039, 1044-45 (Pa. 1999). Because Petitioner alleged ineffectiveness of all prior counsel, however, the court indicated that it would adjudicate this claim from the standpoint of a claim of ineffectiveness of such counsel. *See id.* We have already found that 42 Pa. Cons. Stat. §§ 9543(a)(3) and 9544(b) are independent and adequate state grounds that bar federal review of claims that are deemed waived based on those rules, and we now find that they are properly applied, at least as to direct appeal counsel. Therefore, to review this subclaim on the merits, we would be required to find cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. *See* Part III. B. 2, *supra*. We review the adjudication of the claim of ineffectiveness of direct appeal counsel for failure to raise the claim under the AEDPA, 28 U.S.C. § 2254(d)(1).

The Pennsylvania Supreme Court considered whether the underlying claim of trial counsel ineffectiveness had merit, because if it did not, subsequent counsel could not have been ineffective for failing to raise it. *Strickland*, 466 U.S. at 691. The court recounted the various ways that

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[96] We find this subclaim to have been fairly presented to the Pennsylvania courts and thus exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996).

Petitioner asserts trial counsel should have impeached Baker, and then stated:

> Even if any of these claims had arguable merit, Appellant does not prove, or even allege, that counsel's errors "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa. Cons. Stat. 9543 (a)(2)(ii). Accordingly, no relief is due.

Holloway II, 739 A.2d at 1048.

Under the PCRA statute, before the Pennsylvania Supreme Court may consider a waived or otherwise procedurally barred claim, the Petitioner must both make this prejudice showing and show that counsel was ineffective in his course of conduct that created any procedural bars. It is not clear, however, whether the Pennsylvania Supreme Court applied this prejudice showing separately as an additional procedural hurdle, or merely as part of the showing of ineffectiveness of counsel. We will assume that this prejudice standard is equivalent to that required to show ineffective assistance of counsel under *Strickland* and thus review the court's finding of no allegation or showing of prejudice under the AEDPA.

We believe that this prejudice determination is equivalent to that required by *Strickland*. *See Strickland*, 466 U.S. at 694 (prejudice exists if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and a reasonable probability is "a probability sufficient to undermine confidence in the outcome"); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (showing of prejudice under *Strickland*

requires that "counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect"); *see also United States v. DeRewal*, 10 F.3d 100, 104 (3d Cir. 1993) (defining prejudice as deprivation of "a trial whose result is reliable"). Even if the standards could be considered different, the Pennsylvania standard cannot be considered to be "contrary to" *Strickland*. To be "contrary to" Supreme Court precedent, "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent *requires* the contrary outcome." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999). *Strickland* does not require the contrary outcome in this case, because not only is there no prejudice, but counsel cannot be said to have acted unreasonably. Therefore, a decision based upon this provision cannot be said to be "contrary to" *Strickland*'s requirement of prejudice.

The court's determination that Petitioner made no allegation nor showed any prejudice due to subsequent counsel's failure to raise the claim of trial counsel ineffectiveness was also a reasonable application of *Strickland*.[97] The Petitioner has the burden of showing that counsel's deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. The only statements in the Petitioner's PCRA brief that could reasonably be read as allegations of prejudice are the

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[97] We recognize that in light of the U.S. Supreme Court's limiting the applicability of *Lockhart* in *Williams*, 529 U.S. at 391-98, it could be argued that 42 Pa. Cons. Stat. § 9543(a)(2)(ii) is an unreasonable application of *Strickland*. We do not believe it is, but if it is, we would merely apply a de novo *Strickland* analysis and reach the same conclusion.

following: "Shirley Baker was the key witness against Appellant. If the jury did not believe Baker, the only evidence against Appellant was his purported statement, which he denied having made. Thus, impeaching Baker's credibility was one of counsel's primary duties." (PCRA Br. Pa. S.Ct. at 38.) Even if we disagreed with the Pennsylvania Supreme Court that such a statement was not an *allegation* of prejudice, we would not find its determination to be unreasonable, and we also agree that there was no *showing* of prejudice.

As we explained in Claim V, trial counsel extensively cross-examined Baker on her history of drug use and drug selling, the many drug charges pending against her, and the deal she made with the prosecution for her testimony. *See* Part III. 5. a, *supra*. In light of the strenuous efforts of trial counsel to impugn her credibility, show that she was biased and show that her testimony was unreliable, we agree that there was not such prejudice as to render the trial unfair and the verdict suspect, or to show a reasonable probability that the outcome would have been different, as required by *Strickland*. Therefore, we not only find that the Pennsylvania's Supreme Court's determination as to prejudice was not an unreasonable application of *Strickland*, we would not find prejudice such that the procedural default barring us from granting us relief on the underlying claim was overcome.

We would not find that counsel acted unreasonably, either, were we able to reach the issue. Trial counsel could not have used evidence of Freeman's acquittal to impeach Baker, because he was barred by the trial court's order forbidding him to refer to this acquittal. Even if he had argued that *Commonwealth v. Quaranta* permitted introduction of evidence of Freeman's acquittal to impeach Baker, as Petitioner asserts that he should have, the evidence probably

would not have been admissible. 145 A. 89 (Pa. 1928) ("[T]he fact of acquittal of a [person], as shown by verdict and judgment, is competent proof to affect the credibility of eyewitnesses who have testified to [the person's] presence at the homicide and participation therein."). Baker was not an eyewitness; rather she testified as to the statements and actions of Freeman and Petitioner before they left her presence to commit the murder, and she testified as to their admissions after they did so.

Several other subclaims fail for lack of evidence. The only evidence that Baker could not have seen Caldwell in the van is the affidavit of Freeman, who asserts that one could not see into the van when the windows were closed, because of the van's custom windows. Baker testified, however, that the windows were open, thus making Freeman's assertion only marginally relevant. Petitioner presents no evidence that Baker could not have seen Petitioner and Freeman get inside the van. Likewise, although he asserts that the victim's brother, Alfonso Walker, who testified at trial, could have testified as to Baker's animosity toward Petitioner, he presents no evidence, not even an affidavit, that Walker knew of such animosity or would have testified on that subject in a way helpful to Petitioner. Petitioner alleges no other evidence of such animosity, or any evidence of the allegation that he and Baker had had an intimate relationship and she was biased against him because he ended it as a result of her drug addiction and lack of trustworthiness.

Petitioner also argues that trial counsel should have presented expert evidence that if the shotgun had gone off inside Freeman's pants leg, the result would have been much more severe than "a white spot" on the pants, as Baker testified. Baker testified on cross-examination, however, that when Petitioner and Freeman returned, Petitioner stated that

Freeman "almost shot his leg off." The testimony proceeded as follows:

> Q. Did he show his leg?
>
> A. He was showing a white spot on his pants. He was showing his pants leg to Bubbles, Danny Freeman.
>
> Q. That the conversation was that Blackie, Danny Freeman, almost shot his leg off?
>
> A. Yes.
>
> Q. You mean his own leg?
>
> A. Yes.
>
> Q. You mean in the pants with the gun?
>
> A. Yes. That's what he said.

(N.T. 5/19/86 at 126.) Trial counsel did not act unreasonably in not trying to impeach Baker's testimony with a ballistics expert. Such an expert would not have impeached her testimony. She could have been testifying truthfully, even if Petitioner's statements about the gun going off inside the pants leg were not accurate. Further, such an occurrence and the statement regarding it made by Petitioner are not relevant to whether his admissions as to strangling and shooting Caldwell were truthful, because the statement about the gun going off was not an admission.

Finally, counsel was not unreasonable in failing to impeach Baker with inconsistent testimony from Freeman's

trial, which Petitioner alleges the court would have let him try to do if he would disclose them to the prosecutor. (N.T. 5/19/86 at 119-122.) First, reasonable counsel would not necessarily have known before trial that the prosecutor did not also have a copy of the notes of testimony of the trial of an accomplice of the defendant before him on the same crime, because reasonable attorneys, both defense counsel and prosecutors, would likely obtain such notes in the course of trial preparation. Second, trial counsel had underlined key testimony in the notes that he planned to use to impeach Baker, and he did not want to disclose these mental impressions to the prosecutor–a reasonable reaction. Third, he offered to allow the prosecutor to review the notes of testimony, but asked for an adjournment so that he could review them thereafter and finish preparing his cross-examination. This reasonable offer was rebuffed when the Judge Sabo refused an adjournment, and then even decided not to break for lunch as he had planned to do, forcing trial counsel to continue with his cross-examination without the notes and threatening him with contempt if he tried to use them. Under such circumstances, trial counsel did not act unreasonably.

Finding neither prejudice nor unreasonable actions by trial counsel, we deny relief as to any claim based on trial counsel's alleged ineffectiveness in his impeachment of Baker.

b. Failure To Call Daniel Freeman As A Witness To Support Alibi Defense, And To Show That He Was Acquitted Of The Caldwell Homicide

Petitioner claims that counsel was ineffective because he failed to call Daniel Freeman, Petitioner's alleged accomplice who had been acquitted of the murder, as a witness.

Petitioner asserts that Freeman could have supported Petitioner's alibi defense, and his acquittal could have impeached Baker's credibility.

This subclaim was raised to the PCRA hearing court and to the Pennsylvania Supreme Court on PCRA appeal.[98] Because the Pennsylvania Supreme Court considered it to have been *raised* before the PCRA court because that court had *decided* the claim, the Pennsylvania Supreme Court considered the claim directly, without applying any procedural bars.[99] *Holloway II*, 739 A.2d at 1044, 1048. We therefore review its decision under the AEDPA, 28 U.S.C. § 2254(d)(1).

The court decided that Petitioner's trial counsel was not ineffective for not calling Freeman, because Petitioner could not show prejudice, i.e., that "the absence of the witness was so prejudicial as to have denied Appellant a fair trial." *Holloway II*, 739 A.2d at 1048. The court found that Petitioner's alibi was not supported by Freeman's affidavit, and that "Freeman's testimony easily could have incriminated" Petitioner, and thus "counsel's decision not to call Freeman as a witness was reasonable," and thus the ineffectiveness claim fails.

The prejudice standard applied by the court is thoroughly consistent with the prejudice that must be shown

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[98] We find this subclaim to have been fairly presented to the Pennsylvania courts and thus exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996).

[99] The court could have asserted that the claim was waived because it was not raised on direct appeal.

under *Strickland*, therefore it is not contrary to *Strickland*.[100] We also find that the application of *Strickland* was reasonable. Petitioner presents a sworn affidavit from Freeman, now deceased, that he was available and would have testified that on the evening of the offense he had seen Petitioner in a bar, where Petitioner got sick, and that Petitioner went home to lie down. Freeman stated that later, about 11:30 p.m., he saw Petitioner being helped into a car by a man and a woman Freeman did not recognize. Freeman denied any participation in the homicide, and denied being in Baker's apartment during the relevant time period.

The Pennsylvania Supreme Court decided that Freeman's testimony would not have helped Petitioner's alibi defense, because the latest that he saw Petitioner was at about 11:30 p.m., and the medical evidence shows that the murder was committed sometime between midnight and approximately 1:45 a.m. when the body was found. Despite the fact that this evidence also bolsters the testimony of Carmella Davis, who testified that she went to see Petitioner that evening, found him ill, and took him home with her with the aid of another male friend, we cannot say that the Pennsylvania Supreme Court's interpretation of the evidence was unreasonable. We also agree with the court that trial counsel was reasonable in not calling Freeman because he would reasonably be concerned that Freeman would incriminate Petitioner. Because both trial counsel and Freeman died before the PCRA evidentiary hearing, the only evidence we have is

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[100] Petitioner cannot "demonstrate that Supreme Court precedent *requires* the contrary outcome," *Matteo*, 171 F.3d at 888, because there is no reasonable probability that the outcome of the trial would have been different, i.e. no probability sufficient to undermine our confidence in the outcome. *Strickland*, 466 U.S. at 694.

Freeman's affidavit. However, this evidence is not strong enough to rebut the presumption of reasonable representation that we must accord trial counsel. *Strickland*, 466 U.S. at 689. Trial counsel knew that Freeman had been acquitted and could not be retried, and thus his strongest motive to refrain from implicating Petitioner if he testified no longer existed.

Petitioner also argued before the Pennsylvania Supreme Court, and before us, that if trial counsel had called Freeman as a witness, the Commonwealth surely would have tried to impeach him with his alleged involvement in the murder, and then trial counsel would have been able to introduce evidence of his acquittal under *Commonwealth v. Meredith*, 425 A.2d 334, 338 (1981). We agree that if the Commonwealth would have thus attempted to impeach Freeman, alluding to the fact that he was arrested and tried for the crime, trial counsel could have offered evidence of his acquittal. However, Petitioner's assertion as to the Commonwealth's likely trial strategy is mere speculation. It is just as plausible that the Commonwealth would have strenuously attempted to avoid opening that door even while trying to place him with Petitioner, because the Commonwealth would not want the jury to know that Freeman had been acquitted, and that Baker had been its key witness at that trial as well. Therefore, because there is no evidence on which to base this assertion, we find it to be without merit.

We therefore conclude that the Pennsylvania Supreme Court's determination that trial counsel acted reasonably in not calling Freeman as a witness, and its conclusion that no prejudice resulted from that failure, thus resulting in its finding that counsel was not ineffective, were reasonable applications of *Strickland*.

c. Failure To Challenge The Unsigned Statement Attributed To Petitioner As The Fruit Of An Illegal Arrest

Petitioner claims that trial counsel was ineffective at his suppression hearing because he did not challenge Petitioner's purported statement as the fruit of an illegal arrest in addition to the Fifth Amendment *Miranda* and voluntariness grounds raised, and appellate counsel was ineffective for failing to raise the claim of trial counsel's ineffectiveness. Petitioner asserts that the affidavit of probable cause used to procure the arrest warrant was based on the hearsay statement of Shirley Baker, who was neither an accomplice, eyewitness to, or victim of the crime. She was merely an informant, and because she had no direct knowledge of the crime, the police were required to have a reasonable basis for concluding that her information was reliable. Petitioner alleges that Baker was presumptively unreliable and the police knew it, because she made the statement while under arrest in the self-serving attempt to obtain lenient treatment, and the police failed to put that information in the affidavit of probable cause. Therefore, alleges Petitioner, the affidavit of probable cause was defective, so his arrest was without probable cause, and the unsigned statement attributed to him was the fruit of an illegal arrest and should have been suppressed.

This subclaim was raised to the PCRA hearing court and to the Pennsylvania Supreme Court on PCRA appeal.[101] Because this issue was not raised previously, the Supreme Court of Pennsylvania deemed it to be waived. *Holloway II*,

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101 We find this subclaim to have been fairly presented to the Pennsylvania courts and thus exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996).

739 A.2d at 1044-45. Because Petitioner alleged ineffectiveness of all prior counsel, however, the court indicated that it would adjudicate this claim from the standpoint of a claim of ineffectiveness of subsequent counsel. *See id.* We have already found that 42 Pa. Cons. Stat. §§ 9543(a)(3) and 9544(b) are independent and adequate state grounds that bar federal review of claims that are deemed waived based on those rules, and we now find them to have been properly applied as to this subclaim. Therefore, to review this subclaim on the merits, we would be required to find cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. *See* Part III. B. 2, *supra*. We review the adjudication of the claim of ineffectiveness of direct appeal counsel for failure to raise the claim under the AEDPA, 28 U.S.C. § 2254(d)(1).

The Pennsylvania Supreme Court examined the underlying merits claim, i.e. trial counsel's ineffectiveness for failing to challenge the statement as the fruit of an illegal arrest, because direct appeal counsel could not have been ineffective for failing to raise a meritless issue. *Strickland*, 466 U.S. at 691. The court found that Baker was reliable, and other witnesses corroborated her statement. Therefore the court found that trial counsel was not ineffective for not challenging the statement on this basis. *Holloway II*, 739 A.2d at 1046.

We find that the Pennsylvania Supreme Court's adjudication of the claim of direct appeal counsel's ineffectiveness, finding that he was not ineffective because the underlying claim had no merit, is a reasonable application of *Strickland*, because we agree that the underlying claim has no merit. We agree that other witnesses corroborated important parts of Baker's statement, and that her statement itself was reliable.

The affidavit of probable cause was based on Shirley Baker's statement and two other civilian informants who corroborated significant portions of her statement, as well as a number of police officers.[102] It is true that no eyewitnesses to the crime have ever come forward, and Shirley Baker is the only person to state that Petitioner admitted committing the murder. However, the affidavit of probable cause included a statement by Avis Caldwell, the victim's sister, that corroborates part of Baker's statement. Ms. Caldwell stated that at the victim's funeral, Johnson spoke to Ms. Caldwell and told her that the victim had been in Johnson's van the night of the murder, but he disappeared from it, along with all of the valiums Johnson had in the van; Johnson opined that someone had snatched the victim from the van; a few days after the murder, Johnson had his van cleaned and then the van disappeared from the neighborhood for about six months. This partially corroborates Baker's statements that Johnson had told Petitioner that the victim was in Johnson's van, high on pills, and that when they came back, the victim was no longer in the van. Baker also had stated that about a week after Caldwell's funeral, she told her friend Cheryl and a girl called "Geech," and hinted to Caldwell's brother, that Johnson and Petitioner had something to do with Caldwell's murder. Not long afterwards, Johnson and Petitioner threatened her, telling her that she might get hurt if she kept talking about the murder. The affidavit of probable cause includes a statement by a Gail Burgess, who may or may not be

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102 We have examined the copy of Baker's statement and the copy of the affidavit of probable cause that are in the record transmitted by the Clerk of Quarter Sessions Court of Philadelphia, because parts of Baker's statement filed as an exhibit to the Petition for a Writ of Habeas Corpus were redacted or otherwise illegible.

"Geech," that Shirley Baker told her that if anything happens to Baker, it would be Freeman and Petitioner who did it, because they had killed Caldwell.[103] Baker also stated that the reason for Caldwell's murder was that he was dealing drugs for Johnson and Petitioner, and that he had messed up the money. Ms. Burgess also stated that Caldwell had been selling drugs for Johnson and Petitioner until about a week before he was murdered, when they fired him for messing up their money.

In addition to this corroboration, Baker's statement has inherent indicia of reliability. Baker made several statements against her penal interest, admitting that she had been a drug dealer, starting in 1979, for Petitioner and Johnson, and that she was daily dealing drugs for them at the time of the murder.

We therefore agree that trial counsel was not unreasonable in failing to challenge Petitioner's statement as the fruit of an illegal arrest, and find under the AEDPA that the Pennsylvania Supreme Court's adjudication of the claim of direct appeal counsel's ineffectiveness for failing to raise the claim of trial counsel's ineffectiveness was not unreasonable.

7. Claim VII–Improper Instruction On Accomplice Liability

Petitioner argues that he is entitled to habeas relief because the trial court's jury instruction on accomplice liability relieved the Commonwealth of its obligation to prove

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[103] We acknowledge that such statements are hearsay, but they appear to have been made shortly after the murder occurred, at a time when none, or very few, of the reasons given by Petitioner in Claims V and VI to doubt Baker's veracity existed.

every element of every offense beyond a reasonable doubt, depriving him of his right to due process. Petitioner raised this claim for the first time in collateral proceedings,[104] and therefore the Pennsylvania Supreme Court deemed the claim to be waived both for the failure of trial counsel to contemporaneously object, and for the failure of direct appeal counsel to raise both the claim of trial counsel's ineffectiveness for failing to do so and the underlying claim. *Holloway II*, 739 A.2d at 1043-44. Because Petitioner alleged ineffectiveness of all prior counsel, however, the Pennsylvania Supreme Court treated the claim before it as one of ineffective assistance of direct appeal and trial counsel. *Id.* at 1044. Having previously found that these waiver rules are independent and adequate state grounds barring federal review of the waived claim, we now find them to be properly applied as to this claim and we review the Pennsylvania Supreme Court's decision as to the ineffectiveness of counsel under the AEDPA, and may only review the due process claim if a showing of cause and prejudice is made to excuse the default. *See* Part III. B. 1 & 2, *supra*. We find that the Pennsylvania Supreme Court's denial of relief did not violate the AEDPA's standard and therefore also deny relief on this claim.

In particular, Petitioner objects to Judge Sabo's instruction:

> In order to find the defendant guilty of murder in the first degree, you must find that the defendant caused the death of another person, or

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[104] This claim was fairly presented to both the PCRA hearing court and to the Pennsylvania Supreme Court, and therefore we find that it is exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996).

> that an accomplice of the defendant caused the death of another person. That is, you must find that the defendant and an accomplice's acts is the legal cause of the death of Richard Caldwell, and thereafter, you must determine if the killing was intentional.

(N.T. 5/21/86 at 131-132).

Petitioner argues that this instruction misstated Pennsylvania law regarding accomplice liability, and allowed the jury to convict Petitioner without finding that he possessed the intent to kill beyond a reasonable doubt, as required by Pennsylvania law and due process. Petitioner cites *In re Winship*, 397 U.S. 358, 364 (1970), in which the Supreme Court held that in order to convict, a jury must find that every element of a crime was proven beyond a reasonable doubt. Petitioner concludes that because the charge allowed the jury to find the defendant guilty without finding that he possessed the intent to kill beyond a reasonable doubt, the Pennsylvania Supreme Court's denial of relief was contrary to federal law.

Petitioner is correct that *Winship* requires that each element of a crime be proven beyond a reasonable doubt. Petitioner is also correct in arguing that intent to kill is one element of first degree murder in Pennsylvania and must be proven beyond a reasonable doubt. Read alone, Judge Sabo's instruction would seem to allow the jury to convict, even if Petitioner did not possess the intent to kill required under Pennsylvania law. However, Petitioner was also charged with conspiracy to commit a crime, and found guilty. The conspiracy was one in which murder was the objective, and the jury, properly instructed on this charge, found beyond a reasonable doubt that Petitioner did engage in this conspiracy. Thus Petitioner was found by the jury to possess,

beyond a reasonable doubt, the intent to kill that is required by law, despite the contested instruction.[105]

While the Pennsylvania Supreme Court did not explicitly state this line of reasoning in denying relief on this claim, the cases cited by the court did, and this analysis is entirely reasonable. We conclude that the Pennsylvania Supreme Court's denial of relief was neither contrary to, nor an unreasonable application of federal law.[106] Consequently, we deny relief for this claim.

8. Claim VIII–Improper Instruction On Burden Of Proof

Petitioner argues that he is entitled to habeas relief because the trial court's jury instruction failed to explain that the Commonwealth had the burden of proving every element of any homicide offense beyond a reasonable doubt, depriving Petitioner of due process. Petitioner raised this

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105 Because the jury found intent to kill despite the contested instruction, Petitioner's argument that the Pennsylvania Supreme Court misapplied *Boyde v. California*, 494 U.S. 370 (1990), is rendered moot. *Boyde* held that when there is an ambiguous jury instruction, the court must determine if there is a reasonable likelihood that the jury interpreted it so as to render an unconstitutional verdict. This jury found that Petitioner possessed the intent to kill, thus there is no possibility that the instruction was misapplied.

106 Indeed, for the reasons stated above, we would reach the same conclusion were we to exercise plenary review on the substantive claim after a showing of cause and prejudice or fundamental miscarriage of justice.

claim for the first time in collateral proceedings,[107] and therefore the Pennsylvania Supreme Court deemed the claim to be waived both for the failure of trial counsel to contemporaneously object, and for the failure of direct appeal counsel to raise both the claim of trial counsel's ineffectiveness for failing to do so and the underlying claim. *Holloway II*, 739 A.2d at 1043-44. Petitioner alleged ineffectiveness of all prior counsel, however, so the Pennsylvania Supreme Court treated the claim before it as one of ineffective assistance of direct appeal and trial counsel. *Id.* at 1044. We have already found that these waiver rules are independent and adequate state grounds barring our review of the waived claim, and we now find them to have been properly applied to this claim. We therefore review the Pennsylvania Supreme Court's decision as to claim of the ineffectiveness of counsel under the AEDPA, and may only review the due process claim if a showing of cause and prejudice is made to excuse the default. *See* Part III. B. 1 & 2, *supra*. We find that the Pennsylvania Supreme Court's denial of relief did not violate the AEDPA's standard and therefore also deny relief on this claim.

In particular, Petitioner objects to Judge Sabo's instruction:

> But I repeat that during your deliberations, in order to find the defendant guilty of any class of criminal homicide encompassed in said general murder Bill, you must first find that the Commonwealth has established by the

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[107] This claim was fairly presented to both the PCRA hearing court and to the Pennsylvania Supreme Court, and therefore we find that it is exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996).

evidence introduced, or has proven each and every essential element of that class of criminal homicide beyond a reasonable doubt, as I have previously defined and explained the meaning of that term to you.

Further, I shall now instruct you as to the elements of each of those offenses involved in this case. As I do so, you should keep in mind that after considering all of the evidence, you are entitled to find the defendant guilty of any one of those offenses which you find is established beyond a reasonable doubt by the evidence presented in this courtroom, based on the instructions which I shall now give you as to the elements of each offense.

(N.T. 5/21/86 at 125-26). Petitioner specifically objects to the Judge's failure to instruct the jury that each element of each offense must be proven beyond a reasonable doubt.

Petitioner also objects to Judge Sabo's later instruction in which he defined murder in the first degree:

A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing. Thus, in order to find the defendant guilty of murder in the first degree, you must find that the defendant caused the death of another person or that an accomplice caused the death of another person. That is, you must find that the defendant and an accomplice's acts is the legal cause of the

> death of Richard Caldwell, and thereafter, you must determine if the killing was intentional.

(N.T. 5/21/86 131-132).

Petitioner maintains that these instructions were erroneous because they permitted the jury to convict the Petitioner if it believed that Petitioner's guilt had been proven, even if it still had reasonable doubt about one of the elements of the crime. Petitioner concludes that allowing the jury to convict on a lesser standard deprived him of his due process right.

The Pennsylvania Supreme Court, reviewing the claim on PCRA appeal, examined the underlying claim for merit, because if it had no merit, counsel could not have been ineffective for failing to raise it. *Strickland*, 466 U.S. at 691. The court found that Petitioner's argument on the underlying claim was without merit. The court found that Judge Sabo had in fact instructed the jury that the Commonwealth had an obligation to prove each element of the crime charged beyond a reasonable doubt.[108] *Holloway II*, 739 A.2d. at 1047-1048. We may only overturn this decision if it was contrary to, or an improper application of federal law. The

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[108] Judge Sabo instructed the jury:

> It is not the defendant's burden to prove that he is not guilty. Instead, it is the Commonwealth that always has the burden of proving each and every element of the crime charged, and that the defendant is guilty of that crime beyond a reasonable doubt.

(N.T. 5/21/86 106).

Pennsylvania Supreme Court's decision did not violate these standards established by the AEDPA, and we therefore deny relief on this claim.

The Pennsylvania Supreme Court's holding is predicated on the fact that Judge Sabo had earlier instructed the jury that every element must be proven beyond a reasonable doubt. This is persuasive and not unreasonable under the AEDPA, and this claim for relief could be denied on this ground alone. However, Petitioner seeks to persuade us to overturn this decision by arguing that the judge's later statements counteract that early instruction. In particular, Petitioner's argument seems to center around Judge Sabo's statement, "you must first find that the Commonwealth has established by the evidence introduced, or has proven each and every essential element of that class of criminal homicide beyond a reasonable doubt." (N.T. 5/21/86 at 126). Petitioner argues that this instruction provided the jury two possible standards for finding guilt, establishment by the evidence introduced or proof beyond a reasonable doubt. This is an implausible reading of the instruction. A more likely reading of this instruction is that the Commonwealth may either "establish[] by the evidence introduced," or "prove[]," "each and every essential element of that class of criminal homicide beyond a reasonable doubt." We cannot say that the level of proof required to "establish, by the evidence introduced, guilt beyond a reasonable doubt," is sufficiently different from the level of proof required to "prove guilt beyond a reasonable doubt," to raise due process concerns. Indeed, it seems that Judge Sabo was not giving the jury more than one option but simply supplying them with a supporting definition of "prove."

We conclude that Petitioner's claim is without merit. The Pennsylvania Supreme Court's decision, based on Judge

Sabo's explicit instruction to the jury, did not violate the strict standard of the AEDPA.[109] Additionally, a close reading of the instruction reveals that Petitioner's interpretation is tenuous at best. It is clear both from reading the entire instruction to the jury and reading the disputed portion closely, that no "reasonable juror could have interpreted the instruction to allow a finding of guilty based on a degree of proof below that required by the Due Process Clause." *Cage v. Louisiana*, 498 U.S. 39 (1990). Therefore, we deny relief for this claim.

9. Claim IX–Statutes Of Limitations Claims

Petitioner raises two main claims. First, Petitioner claims that the crimes of Conspiracy and Possession of an Instrument of Crime (PIC) were time barred by the statute of limitations and that his convictions of these crimes violated the Due Process and Ex Post Facto Clauses of the U.S. Constitution and prejudicially affected the jury's guilt and capital sentencing deliberations. Second, he claims that trial counsel was ineffective for failing to move to quash these charges or otherwise raise the statute of limitations issue as a bar to prosecution on such charges and that appellate counsel was ineffective for failing to raise these claims on direct appeal. (Pet. Mem. L. at 58.) This failure by trial counsel allowed the prosecution to proceed and petitioner was convicted even though the charge was time barred. *Id.* Petitioner claims that at the time the offenses were committed on or about May 16, 1980, the statute of limitations for offenses other than murder, including conspiracy, was two years from the date the offense was committed under 42 Pa. Cons. Stat. § 5552. *Id.*

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[109] For the reasons stated above, we would also dismiss the claim were we to exercise plenary review after a showing of cause and prejudice or fundamental miscarriage of justice.

As a result, Petitioner argues that the Commonwealth was required to initiate a criminal prosecution on or before May 17, 1982 for the offenses that occurred on May 16, 1980. (Pet. Reply Mem. at 91.) Accordingly, when the Commonwealth issued Petitioner's arrest warrant on January 9, 1985, and the criminal informations against Petitioner on June 13, 1985, they were barred from doing so under the two-year statute of limitations in effect at the time the offense was committed. *Id.* After the two-year statute of limitations expired in this case, the statute was amended to provide that there is no statute of limitations with respect to conspiracy to commit murder, if a murder results from the conspiracy. 42 Pa. Cons. Stat. § 5551.[110]

Petitioner offers six subclaims in support of his two main claims. Two of these subclaims address the alleged violations of Petitioner's right to due process under the Fourteenth Amendment. He argues that his due process rights were violated because (1) he had a liberty interest in not being charged and convicted on the time-barred Conspiracy and PIC charges; (2) the conviction on the time-barred charges of Conspiracy and PIC prejudicially affected the Petitioner at the guilt and sentencing phases. Petitioner also argues (3) that his conviction violated the Ex Post Facto Clauses of the Constitution because the § 5552 statute of limitations in effect at the time the offense was committed had expired before § 5551 was amended to eliminate the

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110 The provision of 42 Pa. Cons. Stat. § 5551 eliminating any statute of limitations for conspiracy to commit murder became effective December 19, 1984. The 1984 amendments added "Conspiracy to commit murder or solicitation to commit murder if a murder results from the conspiracy or solicitation" to the offenses for which there is no statute of limitations. 42 Pa. Cons. Stat. § 5551 (3). P.L. 1089, No. 218 § 5.

statute of limitations for conspiracy to commit murder. Furthermore, Petitioner argues (4) that trial counsel was ineffective for failing to move to quash or otherwise raise the statute of limitations issue; and appellate counsel was ineffective (5) for failing to raise the issue of trial counsel's ineffectiveness and (6) for failing to raise the underlying Due Process and Ex Post Facto Clause violations. Respondent argues that Petitioner's ineffectiveness claims are defaulted because Petitioner did not adequately present his current constitutional claims to the state courts and that the Pennsylvania Supreme Court correctly determined under state law that there is no statute of limitation on conspiracy to commit murder. (Comm. Resp. at 118.) Consequently, any motion by trial counsel to quash the conspiracy charge would have failed, and counsel cannot be ineffective for failing to raise a meritless claim. *Id.* at 120.

With respect to the PIC charge, the Respondent concedes that the applicable statute of limitations period was two years from the time of the crime. *Id.* at 120. However, the Respondent claims that the statute was tolled during the time that Petitioner was in New York during the five years between the murder and his arrest. *Id.* at 121. In any event, Petitioner's failure to plead or prove otherwise in the state PCRA proceedings required dismissal of his claim under state law. *Id.* Finally, Respondent argues that Petitioner ignores that the only claim actually presented to and adjudicated by the state courts was one of trial and appellate counsel's ineffectiveness for failure for not seeking to quash the indictments, and he ignores the requirement that he prove actual prejudice from the counsel's alleged ineffectiveness. We conclude that because Petitioner failed to allege that he suffered any prejudice because of the PIC charge, no relief is warranted on any claim arising from the PIC charge.

a. Exhaustion And Procedural Default

Before considering the claims themselves, we must determine whether they are properly before this court for review under § 2254(c) of AEDPA. All of Petitioner's subclaims were first presented to the PCRA hearing court and then to the Pennsylvania Supreme Court both on the merits and as part of claims of ineffective assistance of counsel. Therefore, we find that the claims were fairly presented to the Pennsylvania courts on their merits; as underlying claims of trial counsel's ineffectiveness for failing to move to quash or otherwise raise the issue of the expiration of the statute of limitations; and as underlying claims of direct appeal counsel's ineffectiveness for failing to raise the claims of trial counsel's ineffectiveness. These subclaims are therefore exhausted. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-845 (1999).

In its decision on Petitioner's PCRA appeal, the Pennsylvania Supreme Court treated the underlying claims as to the statute of limitations as waived on their merits both for the failure of trial counsel to contemporaneously object to errors occurring at trial and thus preserve these issues for appeal, and for the failure of appellate counsel to raise them on direct appeal as required by 42 Pa. Cons. Stat. §§ 9543 (a)(3) and 9544(b). *Commonwealth v. Holloway* (*Holloway II*), 739 A.2d 1039, 1044-45 (Pa. 1999). Because Petitioner alleged ineffectiveness of all prior counsel, however, the court adjudicated these subclaims from the standpoint of ineffectiveness claims. *See id.* We have found that both of these bases are independent and adequate state grounds barring our review of the underlying substantive claims, and now find that each was properly applied by the Pennsylvania Supreme Court as to these subclaims. Therefore, we will examine the ineffectiveness claims under the AEDPA

standard, but we may only examine the underlying claims on the merits if cause and prejudice or a fundamental miscarriage of justice are shown to excuse Petitioner's procedural default. *See* Part III. B. 2, *supra*.

b. AEDPA Review

Petitioner maintains that he is entitled to relief because (1) trial counsel failed to move to quash the conspiracy and PIC charges or otherwise raise the statute of limitations issue as a bar to these charges and (2) appellate counsel failed to raise the underlying claim or a claim of trial counsel's ineffectiveness. (Pet. Mem. L. at 58.). Because Petitioner raised these ineffectiveness claims in state court and the Pennsylvania Supreme Court adjudicated them on their merits, we review them pursuant to § 2254(d)(1) of the AEDPA, which permits federal courts to grant a writ of habeas corpus if a state decision is contrary to, or an unreasonable application of, clearly established federal law.[111] We find that the Pennsylvania Supreme Court's denial of relief to Petitioner on the basis of this claim does not violate this strict standard, and we therefore deny relief as to the ineffectiveness claims.

The Pennsylvania Supreme Court concluded that Petitioner's conviction was not barred by the statute of limitations and, therefore, counsel could not have been ineffective for failing to raise a meritless claim. *See Holloway II*, 739 A.2d at 1047; *Strickland v. Washington*, 466 U.S. 668 , 691 (1984). State courts have the power to determine their

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[111] Petitioner does not cite any United States Supreme Court cases that could be considered contrary to the state court's denial of his claim and we therefore find that he is unable to satisfy this portion of the AEDPA standard.

own statutes of limitations. The fact that Petitioner disagrees with the resolution of a state law question does not necessarily implicate a federal law or the federal constitution. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("Federal habeas corpus relief does not lie for errors of state law."); *see also Johnson v. Rosemeyer*, 117 F.3d 104 (3d Cir. 1997) (only in extraordinary and compelling circumstances should federal district court in habeas corpus case decline to follow opinions of state intermediate court of appeal with respect to state law rendered in earlier proceedings involving petitioner). We acknowledge that Petitioner has made a plausible case that the Pennsylvania Supreme Court erred in its decision that no statute of limitations exists with respect to the conspiracy charge. Nevertheless, Petitioner's showing does not satisfy the criteria justifying a federal court to depart from a state appellate court's decision on a state law issue.

Petitioner argues that because the statute of limitations for conspiracy under § 5552 had expired before § 5551 was amended (which eliminated the statute of limitations for conspiracy to commit murder), the Commonwealth's application of § 5551 violates the Due Process and Ex Post Facto Clauses. (Pet. Reply Mem. at 91.) The Pennsylvania Supreme Court concluded that there is no statute of limitations for conspiracy to commit murder and the statute to be applied to Petitioner's case is the one in effect at the time his arrest warrant was issued. 42 Pa. Cons. Stat. § 5551. Petitioner cites *Carmell v. Texas*, 120 S.Ct 1620, 1633 (2000), and *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925), for the proposition that the application of a statute that was not in effect at the time the offense was committed, is prohibited ex post facto. However, these decisions do not specifically hold

the application of a statute of limitations not in effect at the time of a defendant's arrest is a violation of the Ex Post Facto Clauses. Petitioner offers no further support for his contention that the Pennsylvania Supreme Court's decision violates his due process rights and the Ex Post Facto Clauses.

The Commonwealth responds with a Pennsylvania Supreme Court case which the Commonwealth argues held that the statute of limitations to be applied is that statute in effect "at the time the present action was commenced." *Commonwealth v. Askin*, 467 A.2d 820 (Pa. 1983). The commencement of prosecution "occurs either when an indictment is found or an information . . . is issued, or when a warrant, summons or citation is issued, if such warrant summons or citation is executed without unreasonable delay." *Commonwealth v. Groff*, 548 A.2d 1237, 1243 (1988). The provision of § 5551 eliminating any statute of limitations for conspiracy to commit murder became effective December 19, 1984. P.L. 1089 No. 217 § 5. Defendant's arrest warrant is dated January 9, 1985, after the amendment to § 5551 became effective. As a result of these holdings, we cannot conclude that the Pennsylvania Supreme Court's decision in Petitioner's case is an unreasonable application of Supreme Court precedent.

We find that trial counsel did not act unreasonably in failing to move to quash the conspiracy and PIC charges under the theory that the statute of limitations expired. In determining whether counsel acted reasonably, there remains a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Because the *Askin* case was decided in 1983 and Petitioner's trial was in 1986, trial and appellate counsel could have reasonably arrived at the same conclusion as did the Pennsylvania Supreme Court

in *Askin* that there was no statute of limitations with regard to conspiracy to commit murder, if murder occurs, under 42 Pa. Cons. Stat. § 5551 because that statute was in effect at the time of Petitioner's arrest. Consequently, they cannot be considered ineffective for failing to raise the statute of limitations issue.

Finally, we do not find that the existence of the conspiracy charge and conviction prejudicially affected the jury's deliberations at the guilt phase of the trial and sentencing phase deliberations. Petitioner argues that his conviction was based in large part on the testimony of Shirley Baker (N.T. 5/19/86 at 77-85) repeating the alleged conversation between Petitioner, Freeman and Johnson. (Pet. Mem. L. at 59.) Petitioner speculates that the existence of the conspiracy charge allowed the prosecution to admit Shirley Baker's otherwise inadmissible hearsay testimony under the co-conspirator exception to the hearsay rule. (Pet. Mem. L. at n.41.) We do not agree. Petitioner ignores settled Pennsylvania law that "[t]he co-conspirator exception applies even where no party has been formally charged with conspiracy." *Commonwealth v. Dreibelbis*, 493 Pa. 466, 475 (1981). Accordingly, "[w]ith respect to the introduction of evidence under the co-conspirator exception, the Commonwealth is only required to prove the existence of a conspiracy by a fair preponderance of the evidence." *Commonwealth v. Mayhue*, 639 A.2d 421, 432 (Pa. 1994). Baker's testimony would have been admissible under Pennsylvania law even if such a formal criminal charge against Petitioner had been barred by the statute of limitations; thus, Petitioner's claim of prejudice at the guilt phase is meaningless.

We find Petitioner's claim of prejudice at the sentencing phase equally unconvincing. Petitioner notes that the statutory aggravating circumstance of murder for hire states

that the "defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim." 42 Pa. Cons. Stat. § 9711 (d)(2); (Pet. Mem. L. at 60). Petitioner appears to argue that the presence of the words "or had conspired" in the statute necessarily means that the jury found the aggravating circumstance as a result of the conspiracy conviction. The jury found that the aggravating circumstance of murder for hire had been proved; it was not necessary that the jury find that the Petitioner "conspired" to be paid. As the Pennsylvania Supreme Court cogently explained, the murder was part of Petitioner's job as a drug dealer. The fact that Petitioner contracted to sell drugs in addition to committing murder does not mean that he did not contract to commit murder.

We in turn conclude that Petitioner's claim does not survive AEDPA's standard of review for state court decisions, and deny it on the merits.[112]

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[112] Because we agree that counsel did not act unreasonably and Petitioner was not prejudiced by the existence of the conspiracy charge and conviction, Petitioner would be unable to show cause so as to overcome his procedural default, and, therefore, we may not reach the underlying merits of his due process claims.

10. Claim X–Ineffective Assistance Of Counsel At Penalty Phase Of Trial

a. Failure To Investigate, Develop, And Present Mitigating Evidence As To Mental Health Issues, And Failure To Request That An Expert Be Appointed To Assist In Developing And Presenting Such Evidence

Petitioner claims that he was deprived of the effective assistance of counsel at the penalty phase of his trial[113] because counsel failed to investigate, develop, and present mitigating evidence that Petitioner suffers from cognitive defects; the effects of emotional, physical and sexual abuse as a child; and had an impaired capacity at the time of the offense as a result of chronic drug and alcohol abuse and acute intoxication. Petitioner claims that trial counsel failed to investigate his background and obtain his medical, school, and mental health records, and failed to request that a mental health expert be appointed to examine Petitioner and assist in presenting mitigating evidence. Petitioner claims that appellate counsel was similarly ineffective for failing to investigate his mental health, request the appointment of a defense mental health expert and raise the claim of trial counsel's ineffectiveness.

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113 Petitioner makes no such assertions as to the guilt phase of his trial, nor does the evidence he proffers reasonably suggest that a mental health defense could have been raised at the guilt phase. We therefore deem all such claims as to the guilt phase to be waived, including any claims under the *M'Naghten* rule or that defendant had diminished capacity.

(1) Presentation Of Mitigating Evidence

After the jury found Petitioner guilty, Judge Sabo discussed the penalty phase with counsel. (N.T. 5/22/86 at 9-16.) Petitioner's trial counsel, Barry Denker, indicated that he would offer testimony of some of Petitioner's relatives as to the fact that he was supportive of them over the years. They were not present at trial and could not be present until the next morning. Judge Sabo indicated that such a delay would be permitted, but then Petitioner indicated that he wanted to proceed immediately. Judge Sabo then conducted a colloquy with Petitioner, and he explained repeatedly that he did not want his family members to be present or to testify because he did not want to reveal his history of drug dealing to them. (N.T. 5/22/86 at 16-23.) Petitioner emphasized that he didn't "want to put them on" or "want them in here" because he never brings his family into his life as far as his "wrongdoing, drug selling, and things like that" are concerned. Petitioner continued: "The only thing they can testify is what they know. I was brought up by the church and stuff like that." (N.T. 5/22/86 at 18.)

After Judge Sabo confirmed with counsel that the (e)(1) mitigating circumstance[114] would apply, he asked defense counsel whether he would argue any other mitigating circumstance, to which trial counsel answered: "Only number five."[115] (N.T. 5/22/86 at 18-19.)

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[114] "The defendant has no significant history of prior criminal convictions." 42 Pa. Cons. Stat. § 9711(e)(1).

[115] "The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.

(Continued)

Judge Sabo continued the colloquy and explained to the Petitioner that his wife, Delores Kareem, who was present in the courtroom, could testify about their family life and his character.[116] Petitioner, however, indicated that he did not want her to testify, and trial counsel told the court: "We're going to proceed right now, Judge." Judge Sabo responded: "I know that, but he has a right to know what he's facing. He has to make that decision. You have a right to testify, and you have a right not to testify, whatever you wish to do." Petitioner responded: "Let's get it over with." Judge Sabo suggested that Petitioner talk it over with his wife before making the decision, and again suggested that she could testify for Petitioner, if Petitioner wished. Petitioner replied, twice: "I put her through enough." The court reiterated that statement and told Petitioner: "That's a decision you have to make. That's a decision you and your wife have to make." Petitioner replied: "One way, I'm going to get the chair. One way I get the chair, the other way I get life. Any way, she loses." Judge Sabo told Petitioner that "it's an important decision" and Petitioner replied that "It's the hardest thing." Judge Sabo again suggested that Petitioner talk to his wife first before making the decision, and trial counsel responded that he was going to call her as a witness anyway. Judge Sabo responded: "You're going to? I thought he wasn't going to call her, because he put her through enough." Trial

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Cons. Stat. § 309 (relating to duress), or acted under the substantial domination of another person." 42 Pa. Cons. Stat. § 9711 (e)(5).

116 "Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." 42 Pa. Cons. Stat. § 9711(e)(8).

counsel again said that he was going to call her, and he did so, and she testified as to their family situation and Petitioner's good character. (N.T. 5/22/86 at 29-32.)

Petitioner's counsel offered a stipulation to the effect that he had no prior criminal convictions to establish the (e)(1) mitigating circumstance. (N.T. 5/22/86 at 33.) Counsel offered no other evidence as to mitigating factors, but in his argument to the jury he referred to the Commonwealth's evidence of Petitioner's purported confession that included the statement that Johnson had Petitioner beaten, leaving scars on his face, apparently in an attempt to argue the (e)(5) mitigating circumstance of duress. (N.T. 5/22/86 at 35.) The jury found that (e)(1) and (e)(8) applied, as well as the aggravating factors (d)(2), contract killing, and (d)(8), torture. The jury weighed the aggravating and mitigating factors and imposed the death penalty. (N.T. 5/22/86 at 65, 70.)

After trial, Judge Sabo ordered that a mental health evaluation be performed on Petitioner as part of a presentence investigation. The evaluation was conducted by psychologist Albert Levitt, M.Ed. on May 29, 1986, one week after the completion of the penalty phase, and the report was submitted to the court on July 3, 1986.[117] During the PCRA proceedings, PCRA counsel raised claims similar to those before this Court, and counsel requested in 1992 that a defense mental health expert be appointed to evaluate the Petitioner and assist in his claims. The court denied funds for such an expert. In 1996, three mental health experts who were present in the Philadelphia area on other business evaluated Petitioner pro bono and sent letters as to their conclusions to counsel. Such letters were presented at the PCRA

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[117] As we discuss *infra*, the report stated that Petitioner had a Personality Disorder–Dependent Personality.

hearing, but the court denied funds to pay for travel expenses for these experts to testify at a subsequent PCRA hearing. Instead, the Commonwealth stipulated to both the authenticity of the letters and to the findings contained in them. (PCRA Hrg. 2/10/97 at 7, 12-14.)

(2) Direct Appeal And PCRA Proceedings

On direct appeal, Petitioner raised a claim of trial counsel's ineffectiveness for failing to present evidence that would mitigate against the death penalty. Appellate counsel argued that trial counsel had the opportunity to present evidence as to mitigating circumstances (e)(1), (4),[118] (5) and (8), but the only witness he put on the stand was Petitioner's wife, who testified as to the fact that they owned a house, had a child with a serious heart problem, and that Petitioner had only a sixth grade education and worked as a writ server. (N.T. 5/2/86, 29-32.) Appellate counsel argued that evidence should have been presented as to Petitioner's illiteracy; the poverty, drugs, and violence prevalent in the neighborhood where Petitioner grew up; that his parents separated when he was young; and that he hadn't sold drugs since 1983 and was trying to make a productive citizen of himself.[119] (Dir. App. Br. at 26-27.)

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118 "The age of the defendant at the time of the crime." 42 Pa. Cons. Stat. § 9711(e)(4).

119 Appellate counsel also briefly argued that there was evidence that Petitioner was under the influence of drugs during the commission of the offense, which apparently would go to either the (e)(2) or (e)(3) mitigating factor, or both: "(2) The defendant was under the influence of extreme mental or emotional distur-

(Continued)

Petitioner's primary argument, however, was that trial counsel failed to mention a variety of possible mitigating circumstances that could be used to show that Petitioner was acting under duress or the substantial domination of Johnson when he committed the crime, i.e. that the (e)(5) mitigating factor, which counsel argued during the penalty phase, should have been more fully presented. (Dir. App. Br. at 27-30.) Such mitigating circumstances included Petitioner's limited education and low I.Q., the quality of Petitioner's upbringing and home life, his emotional and psychological makeup, and other factors. Appellate counsel even pointed to the Commonwealth's own evidence, i.e. the purported statement made by Petitioner confessing to the crime, in which Petitioner allegedly said that Johnson told him "it's either you or him," Johnson had previously threatened to kill him and his family, and that Johnson had previously had Petitioner beaten, leaving scars on his head.

The Pennsylvania Supreme Court ruled that the claim of trial counsel's ineffectiveness in "failing to bring to the jury's attention that he was subject to the domination of Johnson; could not read or write; had not sold drugs since 1983; had grown up in a crime infested neighborhood and was the product of a broken home and suffered from alcohol dependency" were "totally without merit." *Holloway I*, 572 A.2d at 692. The court noted that argument on the (e)(5) mitigating circumstance "would have been inconsistent with

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(Continued)

bance; (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." 42 Pa. Cons. Stat. § 9711 (1988). The present Petition also raises this argument, but only as to factor (e)(3).

his defense" at trial, which was that he was not at the scene of the crime. *Id.* The court also found that there was no evidence offered as to Petitioner's illiteracy, but rather that he had attended school until the sixth grade. The court further found that trial counsel could not have been ineffective for failing to present mitigating evidence because "the appellant did not wish a continuance to secure the presence of other witnesses who would have testified as to his environment and good character" when trial counsel stated that some relatives could testify but were not present. *Id.* The court noted that the only witness Petitioner allowed to testify was his wife, and "primarily on the basis of her testimony the jury found the mitigating circumstance of character." *Id.* The court concluded that "because the decision to limit testimonial evidence in aid of mitigation was at the request of appellant, trial counsel should not be deemed ineffective for respecting his client's wishes." *Id.*

In his filings to the PCRA hearing court[120] and on PCRA appeal, Petitioner argued that trial counsel was ineffective both for failing to investigate, develop, and present evidence in mitigation and rebut alleged aggravating factors and for failing to arrange for any mental health mitigation evaluation of Petitioner or investigate his childhood, upbringing, mental health and life history. Petitioner argued that trial counsel's failure to investigate reasonably was prejudicial, for he failed to uncover significant and powerful mitigating evidence that could and should have been presented to the jury. (PCRA Br. Pa. S.Ct. at 60-61.) Petitioner argued that trial counsel's failure to investigate was unreasonable because counsel knew or should have known from talking to

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120 These issues were raised in the Amended Petition under Post Conviction Relief Act and in the Supplemental Memorandum of Law in Support of Petitions under Post Conviction Relief Act.

his client, defense witnesses, or even from the purported statement of his client that he was a chronic drug abuser who allegedly was heavily abusing drugs on the night of the offense.[121] As a result, counsel had a duty to investigate his history of drug abuse, causes thereof, his mental state on the night of the offense, and other available mitigating evidence. Had trial counsel conducted such an investigation, he could have arranged for a mental health evaluation for assistance in preparing and presenting the defense or mitigating evidence.[122]

The allegation of prejudice made in the PCRA appeal brief focused on Petitioner's mental health, discussing not only the effect on the (e)(5) factor, but also the effect on (e)(2), (3) and (8). Appellate counsel argued that the findings of the court-appointed psychologist Mr. Levitt, made within weeks after Petitioner's trial and stipulated to by the Commonwealth (PCRA Hrg. 2/10/97 at 4), clearly indicated that the provision of mental health expert services for Petitioner was necessary for trial counsel to identify, plead, and present mental health related claims for relief, because findings like

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[121] Although the latter evidence goes to Petitioner's alibi defense that he was passed out from drug use on the night of the offense, it could also be used to show that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. 42 Pa. Cons. Stat. § 9711(e)(3).

[122] As evidence of trial counsel's failure to investigate, PCRA counsel mentions only counsel's purported failure to conduct an independent investigation of guilt-phase evidence. Habeas counsel has also made this argument. (Pet. Mem. Law at 61.) Such an argument is unavailing because the statements cited, when taken in context, do not prove that counsel failed to conduct a guilt-phase investigation.

those made by Mr. Levitt could have been introduced as mitigating evidence. Mr. Levitt concluded that Petitioner "best meets the diagnostic criteria of Personality Disorder–Dependent Personality[123] characterized by a history of drug abuse coupled with a dyssocial lifestyle." (Pet. App. 11 at 3.) This psychologist further found that "there also appears to be a depressive element involved in his personality" and that Petitioner "does not suffer from a major mental illness." *Id.* Mr. Levitt also noted that Petitioner reported being a heavy drinker and used cocaine on a daily

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[123] Petitioner explained in his PCRA appeal brief that a personality disorder is a "personality trait that is 'inflexible and maladaptive and causes either significant impairment in social or occupational functioning or subjective distress.'" (PCRA Br. Pa. S.Ct. at 65 (quoting *Diagnostic and Statistical Manual of Mental Disorders* 305 (3d ed. 1980) (hereinafter "DSM-III").) Another leading treatise often cited by the courts, *see, e.g., Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982), describes a personality disorder as a "serious mental health impairment that adversely affects and undermines 'cognition (i.e., ways of perceiving and interpreting self, other people and events); 'affectivity (i.e., the range, intensity, lability, and appropriateness of emotional responses)'; 'interpersonal functioning', and 'impulse control.'" (PCRA Br. Pa. S.Ct. at 64 (quoting Kaplan & Sadock, *Comprehensive Textbook of Psychiatry* 1425 (6th ed.)).) Dependent personality is characterized by passivity; lack of self-confidence and an inability to make demands on or stand up to others on whom the individual is dependent; and a belittling of the individual's own assets or abilities. Anxiety and depression are common associated features. (PCRA Br. Pa. S.Ct. at 64 (citing DSM-III at 324-25).)

basis from 1978 to 1983; had a history of a disturbed home life; and because of his age, it was unlikely that he would have trouble with the law in the future. *Id.* The brief also discusses the findings of the other three mental health experts, licensed psychologists Harry Krop, Ph.D.[124]

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[124] Dr. Krop's report, dated February 5, 1997, was based on a clinical interview and a battery of psychological tests administered on October 5, 1996, as well as materials provided by counsel. (Pet. App. 12.) He found that Petitioner "presents with a history of alcohol and drug abuse and also derives from a dysfunctional family unit." He also opined that it was also likely that Petitioner was intoxicated on the day of the alleged offense. He reported that Petitioner was "both emotionally and physically abused within the family and he was the victim of an extra-familial sexual assault when he was ten or eleven years old." He found that his evaluation of Petitioner is "inconsistent with any major mental illness" and "inconsistent with an Antisocial Personality Disorder." He also opined that given his history, Petitioner is capable of functioning in an open prison population and that the alleged offense appeared to be out of character for Petitioner. Finally, Dr. Krop noted that "there are several mitigating factors that should have been explored and presented at the time of Mr. Holloway's trial." He also offered to elaborate on his findings in a more detailed report in the future, but there is no such report in the record before us.

and James D. Larson,[125] Ph.D., and Robert A. Fox. Jr.,

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[125] Dr. Larson's report, dated February 4, 1997, was based on a five-hour psychological evaluation conducted on October 12, 1996. (Pet. App. 13.) According to Dr. Larson, Petitioner has a "limited but significant psychiatric history." Petitioner's emotional instability

> resulted in an approximately three-week psychiatric hospitalization in 1959. He reported outpatient psychiatric evaluation and apparently treatment in approximately 1970 when he began to manifest symptoms of a hysterical pregnancy in response to his wife's pregnancy. His emotional instability is also reflected in an intermittent depression throughout life. At an early stage (approximately 17) he made a significant suicide attempt by laceration. Apparently he was not afforded the opportunity for psychiatric or mental health intervention at that time.

Dr. Larson also described Petitioner's childhood and family life. In Petitioner's elementary school years, "he was identified as in need of special education because of learning difficulties." Further, his childhood grew increasingly chaotic with multiple moves and caretakers, and he only attended school regularly until the sixth grade. He had no father figure in his important developmental years. At one point in his early years he was placed with an aunt in Baltimore because his mother, who was in Alabama, was unable to care for him. This aunt emotionally and physically abused Petitioner. At another time his mother beat him, breaking his arm, which went untreated for two days. The break was so severe that he required surgery and was hospitalized for six weeks. Dr. Larson noted that Petitioner became tearful when discussing his abusive and rejecting childhood treatment, even though he was fifty-five years old at the time of the evaluation. Because of his treatment, Petitioner ran away from home many

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M.D.,[126] who evaluated Petitioner in 1996 and made findings

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times and was placed in numerous other homes. On one occasion when he ran away after a beating at about age ten, he was raped by an adult male.

Dr. Larson also described Petitioner's drug and alcohol abuse and the effects of that abuse. He described Petitioner as having a lengthy history of polysubstance abuse that "progressed to dependence and then addiction. In its final stages, his substance abuse escalated to the point that his behavior deteriorated. Personal functions were severely altered, and he experienced changes in his functioning at a level consistent with probable cocaine psychosis during the time frame of the murder for which he is currently convicted."

[126] Dr. Fox's report, dated February 1, 1997, was based on a three-hour evaluation conducted November 23, 1996, and focused primarily on Petitioner's cognitive deficits, drug abuse and the effects of the drug abuse on his mental state. (Pet. App. 14.) Dr. Fox found that Petitioner was "superficially well-engaged, intelligent, showed good memory and intact cognitive function" but then as the evaluation progressed it became apparent that he suffers from a significant cognitive deficit manifested in difficulty in word-finding, memory lapses, and logical inconsistencies. He noted that at the time of his arrest, Petitioner was functionally illiterate and only minimally performed in school, which he attended only to the sixth grade. During his incarceration Petitioner learned how to read and write, even preparing a number of pro se briefs, but a close reading of such briefs reveals "certain language dysfunctions primarily grammatical in nature and nearly as extensive as the language dysfunctions noted in the interview." Dr. Fox noted that Petitioner reported "what must be considered flashbacks secondary to his years of drug use which are primarily perceptual in nature. It is likely that at the time of the offense and his arrest these deficits were significantly more severe because of

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relating to mitigation. (PCRA Br. Pa. S.Ct. at 65.) Such findings related to his drug and alcohol abuse; physical, emotional and sexual abuse as a child; cognitive difficulties; mental and emotional impairments; hospitalization for mental health reasons; and a suicide attempt. (Pet. App. 12-14.) PCRA counsel argued that if trial counsel had conducted a reasonable investigation, trial counsel would have discovered enough information to indicate that he should have sought the services of a mental health expert to develop mental health mitigation. PCRA counsel also argued that appellate counsel was ineffective for failing to raise this issue previously.

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his prior history, nearly twenty years, of drug and alcohol abuse." Dr. Fox concluded that his ten years of sobriety while in prison have resulted in "significant improvement in his cognitive ability."

Dr. Fox then described in more detail Petitioner's drug abuse and the effects of the drug abuse on his mental state. At the time of the offense, Petitioner was a heavy and long-term drug and alcohol user. He began using alcohol on a regular basis in the late 1960s and used it continuously and in large quantities throughout the mid-1980s. From the mid-1970s to early 1980s he was a regular user of cocaine and Phencyclidine (PCP). Dr. Fox explained that the regular use of alcohol and PCP were of greatest concern regarding his mental state, because both of these drugs causes chronic and lasting cognitive impairment. Petitioner reported that on the day before the alleged murder, he used alcohol, cocaine and PCP, and passed out. Dr. Fox explained that use of PCP on a habitual basis caused chronic cognitive and perceptual disturbances. Finally, he concluded that "by the nature of his description of his lifestyle during that period of time it is my sense that he developed a grandiose and paranoid delusional system which to some degree still exists. There is thus evidence of diminished capacity due to chronic drug abuse."

The Pennsylvania Supreme Court's decision on PCRA appeal refused to address the claim of ineffective assistance of counsel for failure to investigate, develop, and present mental health mitigating evidence raised by Petitioner in the PCRA appeal brief, ruling that the claim had already been decided on direct appeal.[127] The court did not address the issue of appellate counsel's ineffectiveness, which could have only been raised for the first time in PCRA proceedings.

(3) Analysis

(a) Standard Of Review

Petitioner's claim of ineffective assistance of trial counsel for failure to investigate, develop, and present mental health mitigating evidence, including his failure to arrange for a mental health mitigation evaluation, that was raised to the PCRA hearing court and on PCRA appeal is substantially equivalent to the instant claim, therefore the claim before us was fairly presented to the Pennsylvania Supreme Court and has been exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996); Part III. C. 10. a. (2), *supra*. In *Holloway II*, the Pennsylvania Supreme Court summarily dismissed this claim as previously litigated. We respectfully believe that the Pennsylvania Supreme Court was only referring to the claims of ineffectiveness of counsel actually presented to it and their

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[127] The PCRA trial judge addressed mental health issues only to the extent that he found that trial counsel was not ineffective for not pursuing a defense of diminished capacity in the guilt phase and that the PCRA court did not err in denying funds to secure psychiatric testimony that would support such a defense. Judge Sabo did not address any issues relating to mitigating evidence.

logical extensions. We believe it did not mean that claims based on a different set of operative facts and different legal theory than the claims before it on direct appeal were previously litigated.[128] Therefore, as to the claims raised on direct appeal, we must apply the AEDPA in reviewing the Pennsylvania Supreme Court's decision.[129] However, the instant claim of ineffective assistance of trial counsel for failure to investigate, develop, and present mental health mitigating evidence and failure to request that a mental health expert be appointed cannot be said to have been adjudicated on the merits by the Pennsylvania Supreme Court. *See Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000). Because the claim has been exhausted but was not adjudicated on the merits, we review the claim de novo. *See id.*; *see also Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). We find that Petitioner's trial counsel was ineffective for failing to investigate, develop, and present mental health mitigating evidence and for failing to request that a defense expert be appointed by the court to assist in these matters, as is the

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128 The Third Circuit has opined that an "ineffective assistance of attorney claim if advanced on one basis does not mean that such claim has been previously litigated if advanced on another." *Ross v. Petsock*, 868 F.2d 639, 642 (3d Cir. 1989).

129 On direct appeal, Petitioner argued that evidence should have been presented as to his illiteracy; the poverty, drugs, and violence prevalent in the neighborhood where he grew up; that his parents separated when he was young; that he suffered from alcohol dependency; that he hadn't sold drugs since 1983 and was trying to make a productive citizen of himself; and that he was acting under duress or the substantial domination of Johnson when he committed the crime.

Petitioner's due process right under *Ake v. Oklahoma*, 470 U.S. 68 (1985).[130]

(b) Unreasonableness Of Counsel's Actions And Omissions

Although *Strickland* requires us to afford trial counsel's conduct a heavy presumption of reasonableness, 466 U.S. at 689, we are aware of the overwhelming importance of mitigation evidence to the just imposition of the death penalty. The presentation of mitigation evidence allows counsel to individualize a defendant by humanizing him and explaining his behavior, background, and character outside the constraints of the normal rules of evidence. In capital cases, where the need for individualized sentencing is greatest, the right to present mitigating evidence to the jury is constitutionally protected. *See Williams v. Taylor*, 529 U.S. 362, 391-98 (2000); *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("The need for treating each defendant in a capital

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[130] Even if we were to take the Pennsylvania Supreme Court at its word and apply the AEDPA in analyzing the direct appeal decision as a decision on the instant claim, the outcome would be the same. We would respectfully have to find that the Pennsylvania Supreme Court's application of *Strickland* was unreasonable. Trial counsel's conduct complained of on direct appeal and found to be reasonable in *Holloway I* is wholly different than the conduct of trial and appellate counsel complained of to the PCRA court and to us. A decision based on an analysis of one set of facts and legal theories cannot reasonably be applied to another set of facts and legal theories only tangentially related to the former set. The claims before us relate to mental health evidence, which is completely unrelated to the evidence Petitioner waived: testimony of family members that Petitioner was supportive of them over the years.

case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). We must therefore insure that at the penalty phase the jury made an individualized decision with the "fullest information possible concerning the defendant's life and characteristics," and must scrutinize carefully any decision by counsel that deprived Petitioner of mitigation evidence. *Lockett*, 438 U.S. at 603.

Failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness. *See United States v. Gray*, 878 F.2d 702, 711-12 (3d Cir. 1989) (holding that defendant's reluctance to subpoena witnesses to compel their attendance at trial did not absolve counsel of his independent professional responsibility to investigate whatever information these potential witnesses possessed, even if he later decided not to put them on the stand, and that "counsel's behavior was therefore not colorably based on tactical considerations but merely upon a lack of diligence," so counsel's performance fell "below the minimum standard of reasonable professional representation"); *see also Sullivan v. Fairman*, 819 F.2d 1382, 1391-92 (7thCir. 1987) (holding that perfunctory attempts to contact witnesses was not reasonable); *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (counsel's interviewing only one witness was unreasonable); *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985) ("[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."); *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984), *cert. denied*, 469 U.S. 1226 (1985) ("Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation."). In *Gray*, the Third Circuit

explained that a complete failure to investigate is unreasonable because "counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." *Gray*, 878 F.2d at 711 (citing *Strickland v. Washington*, 466 U.S. at 690-91). In *Strickland*, the Supreme Court explained:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 690-91.

Petitioner presents no direct evidence of trial counsel's failure to investigate his mental health issues, including cognitive defects; the effects of emotional, physical and sexual abuse; and the effects of chronic drug and alcohol abuse; or any possible reasons for counsel's failure to conduct such an investigation.[131] Petitioner does not even allege that he

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[131] We recognize that it is often impossible to prove an omission.

ever mentioned such issues to counsel so as to alert counsel to a need to investigate; however, we recognize that even when a defendant is uncooperative, counsel still has a duty to interview friends and relatives and otherwise investigate to discover whether mitigating evidence exists. *See Gray*, 878 F.2d at 712. Petitioner alleges that such an investigation was not conducted and that counsel should have known from the evidence in the case to investigate, at the very least, possible effects of Petitioner's chronic drug and alcohol abuse.[132]

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[132] Petitioner has requested an evidentiary hearing to show that trial counsel was ineffective. Presumably, Petitioner would testify as to his conversations with trial counsel, and perhaps close relatives would testify as to their contact with counsel or his investigator. We note, however, that no such persons have been identified in the briefs, and thus no affidavits have been included as appendices or even offered to be submitted as evidence. The propriety of our taking such testimony would be unaffected by Petitioner's waiver of testimony of relatives at his penalty phase trial, because we would not be considering the effect of their testimony on the jury's ultimate decision on mitigating factors and penalty. Rather, we would only be examining their testimony to determine whether trial counsel conducted an investigation, and, if so, whether the investigation was reasonable. Depending on the content of such testimony, we could also use it to determine whether counsel's failure to request that a defense mental health expert be appointed was reasonable.

Such testimony would only be subject to the testing of cross-examination. It could not be rebutted by examining trial counsel, nor can Petitioner examine trial counsel to support his allegations of ineffectiveness, because Mr. Denker is deceased. He died on March 1, 1996, nearly a year before Petitioner's PCRA hearing was held. (PCRA Hrg. 2/10/97 at 4.) Mr. Denker's failure to investigate mental health issues and seek appointment of a mental health expert was discussed at this hearing, but no evi-

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The extensive findings in the evaluations conducted immediately post-trial and during PCRA proceedings indicate that such information existed before trial and could have been discovered had counsel searched for it. The existence of this information leads to several possible inferences about counsel's investigation: (1) trial counsel failed to investigate completely; (2) trial counsel investigated partially, but no information as to mental health issues was uncovered; or (3) trial counsel investigated and information as to mental health issues was revealed. Because the post-trial evaluations show that mental health evidence existed prior to trial, both a complete failure to investigate and a partial investigation that failed to uncover such evidence must be considered unreasonable because counsel probably would have discovered such evidence had his investigation been reasonable. *See Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (where counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing [defendant's] nightmarish childhood" counsel's omissions "clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *Strickland*, 466 U.S. at 690-91. Likewise, because such evidence probably would have been discovered,

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dence was offered. Because the claims as to the failure of trial to investigate mental health issues and present mental health expert testimony were first raised on PCRA, no court was able or ever will be able to inquire directly into trial counsel's alleged omissions and the reasons therefor. Petitioner therefore does not have available the usual method of showing counsel's ineffectiveness, but he should not be disadvantaged because of trial counsel's untimely death before the PCRA hearing was held. Therefore our analysis contains more alternatives than might otherwise be the case.

counsel's decision not to make such an investigation, if indeed he made such a decision, must be considered unreasonable. Further, whether or not an investigation was conducted and whether or not evidence as to mental health issues was uncovered, such evidence must have existed, and therefore counsel acted unreasonably in failing to request that a defense mental health expert be appointed.

Trial counsel demonstrated a lack of either preparation[133] or knowledge, or both, in failing to request that the trial court appoint a defense expert to assist in the preparation of Petitioner's mitigation defense at the penalty phase. Petitioner's inability to take advantage of such an expert, were he entitled to one, would result in a violation of his Fifth Amendment due process right to access to the adversarial process. *See Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that the Fifth Amendment grants indigent defendants the right to have independent experts appointed by the court for assistance in establishing mental incapacity defenses and mental health mitigating evidence); *see also Holland v. Horn*, – F. Supp. 2d –, No. 99-CV-2551, 2001 WL 704493, *33-37 (E.D. Pa. Apr. 25, 2001) (finding violation of *Ake* even though defendant had requested that a defense expert be appointed to assist only at the penalty phase). Petitioner's trial was held after *Ake* was decided, so he was clearly entitled to such an expert if he could demonstrate to the trial

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133 On at least one occasion defense counsel implied a lack of preparation in the case, noting that he "had been on trial for a month. And then I had to go right into another homicide." (N.T. 5/13/86 at 93-94.) He also seemed unaware that the Commonwealth planned to seek the death penalty, indicating that he was not "even sure there was a death penalty" in 1980 at the time of the homicide. Further discussion on this issue was then held off-the-record. (N.T. 5/12/86 at 121.)

judge that his mental condition was seriously at issue. *See Ake*, 470 U.S. at 82; *see also Starr v. Lockhart*, 23 F.3d 1280, 1288 (8th Cir. 1994) (requiring that defendant show "a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial"). Trial counsel presented no such information to the trial court, but the later evaluations, even the one conducted by the court-appointed psychologist, show that mental health issues would have been a significant factor at the penalty phase. Upon such a showing, the trial court would have been required to appoint a mental health expert to assist the defense. There can be no strategic or tactical reason for counsel to fail to request that a mental health expert be appointed to assist the defense when mental health issues could be a significant factor at either the guilt or penalty phase, because such an expert is necessary to effectively develop and present such evidence, as well as to assist counsel and his client in deciding whether such evidence should be presented at trial.

Petitioner's decision to go ahead with the sentencing proceeding without a continuance so that several family members could testify on his behalf, which the Pennsylvania Supreme Court held, in essence, acted as a waiver of a claim of ineffectiveness for counsel's failure to put on more mitigation witnesses, does not affect our decision as to counsel's ineffectiveness for failure to investigate mental health issues or seek appointment of a mental health expert or our decision, *infra*, as to the prejudice caused by these failures.[134] First, counsel's duty to investigate reasonably and

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[134] On direct appeal, the Pennsylvania Supreme Court noted that Petitioner had waived the right to present witnesses who would have testified as to his environment and good character.

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inform and advise his client must be fulfilled before either

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The court also pointed to this finding on PCRA appeal in reviewing the claim of PCRA trial court error for failure to provide funds for expert mental health services at that stage. The courts are split as to whether such waivers should be considered issues of fact or mixed questions of fact and law. *See Battenfield v. Gibson*, 236 F.3d 1215, 1231 n.8 (10th Cir. 2001) (reviewing cases). While we believe that the issue is one of fact, we would reach the same outcome regardless of which way the issue is characterized: the finding of the Pennsylvania Supreme Court that Petitioner had waived his right to present mitigation witnesses, and therefore that counsel could not have been ineffective for failing to present them, was correct, as far as it went, i.e. it was a waiver of character evidence to which his relatives might have testified. If the issue were a mixed question of fact and law, we would find unreasonable the court's implicit finding that the waiver as to a mental health expert was knowing and intelligent. 28 U.S.C. § 2254 (d)(1). If the issue were one of fact, we would find the Pennsylvania Supreme Court's decision unreasonable in light of the clear and convincing evidence in the record. 28 U.S.C. § 2254(d)(2), (e)(1).

A close reading of the record shows that Petitioner gave specific reasons for waiving the testimony at the penalty phase by his wife and other relatives, who were the only mitigation witnesses, other than himself, that he knew about. His decision to "get it over with" was made in the context of family concerns. He expressly waived the testimony of the relatives other than his wife, explaining quite clearly that he did not want them to be present or to testify because he did not want them to know that he had been dealing drugs. Petitioner made the "Let's get it over with" statement, clearly indicating that he wanted to proceed forthwith, during his conversation with Judge Sabo about his right to have his wife testify on his behalf, in which he stated that he had already "put her through enough." There is no reason to believe, and it

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the lawyer or his client can decide what evidence to present; if counsel failed to investigate and advise, then Petitioner's waiver was not knowing and intelligent and thus without legal effect. *See, e.g., United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989) (defendant's reluctance to subpoena witnesses to compel their attendance at trial did not absolve counsel of his independent professional responsibility to investigate to determine what information these potential witnesses possessed, even if he later decided not to put them on the stand; nor did reluctance act as a waiver because it was based on inaccurate information: counsel did not know and therefore failed to inform defendant that subpoenaed witnesses were entitled to compensation for their trouble); *Blanco v. Singletary*, 943 F.2d 1477, 1500-05 (11th Cir. 1991) (counsel's failure to talk to potential mitigation witnesses and to investigate defendant's mental health status were unreasonable, because without knowing what evidence defendant was foregoing, counsel "could not have advised [him] fully as to the consequences of his choice not to put on any mitigation evidence," and therefore the waiver had no effect); *Battenfield v. Gibson*, 236 F.3d 1215, 1227-35 (10th Cir. 2001) (counsel failed to conduct a reasonable

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would be illogical to do so, that these concerns about putting his wife through another difficult experience or his family learning that he was dealing drugs would extend to a professional who would have testified on his behalf as to mental health issues. Based on the evidence of the circumstances of the waiver and the reasons given by Petitioner for waiving testimony from his family, there is a reasonable probability that Petitioner would not have waived his right to present mental health mitigation evidence from a mental health expert, had counsel made him aware of the possibility. We therefore find that Petitioner's waiver was not knowing and intelligent with respect to his right to present a mental health expert at the penalty phase, and therefore was without legal effect.

investigation for possible mitigating evidence and was therefore unaware of various mitigation strategies and evidence that could have been presented in the penalty phase, and thus counsel could not competently advise defendant as to meaning, nature, and availability of mitigating evidence; defendant's waiver was thus not knowing and intelligent). Second, the relatives who would have testified as to Petitioner's environment and good character were proffered only for the fact that Petitioner was supportive of them over the years, and perhaps also his upbringing in the church. There is no evidence that they knew about, or could have testified to, anything related to Petitioner's physical and sexual abuse as a child; drug and alcohol use; and mental, emotional, and cognitive difficulties that existed either independently or as a result of his childhood abuse or drug and alcohol use. Therefore a waiver of the presentation of their proffered testimony would be irrelevant to testimony on other subjects. Third, even if they had knowledge of and would have testified as to these issues, it is likely their testimony would have raised an inference of the need for the appointment of a defense mental health expert, which would show that trial counsel was unreasonable in failing to make such a request. Fourth, if their testimony was indeed unrelated to Petitioner's history of physical and sexual abuse as a child; drug and alcohol use; and mental, emotional, and cognitive difficulties, then this fact would indicate that trial counsel's investigation as to mitigating evidence was unreasonable. The court's presentence investigation raised an inference of mental health issues; surely if counsel had conducted a reasonable investigation of all possible mitigating factors, he would have asked these relatives about mental health issues, and such information would have been discovered to justify asking the court that a defense mental health expert be appointed under the right guaranteed by *Ake v. Oklahoma*.

To summarize, trial counsel had a duty to investigate whether each of the mitigating circumstances might apply. On the one hand, he may have either completely failed to conduct such an investigation as to mental health issues, or conducted such an unreasonably cursory investigation that he obtained no such information. Subsequent evaluations of Petitioner show that such information must have existed, and counsel's constitutional duty to adequately represent his client would have required that he request the court to appoint an expert to assist in the investigation and presentation of mitigating evidence. On the other hand, if trial counsel indeed had some knowledge of Petitioner's alleged mental infirmities, his decision not to request that an expert be appointed cannot be said to be a strategic or tactical decision. Petitioner had a constitutional right to such assistance in developing evidence of his mental and emotional state even if Petitioner and counsel ultimately decided not to present such evidence. *See Christy v. Horn*, 28 F. Supp. 2d 307, 321 (W.D. Pa. 1998) (finding that *Ake* required psychiatric assistance "'to help determine whether the insanity defense is viable.' Thus, implicit within *Ake*, such assistance is required when a defendant's mental state is at issue, even if the defendant ultimately abandons an insanity defense.") (quoting *Ake*, 470 U.S. at 82); *see also Holland v. Horn*, – F. Supp. 2d –, 2001 WL 704493, at *34 (citing *Christy* and *Ake* approvingly). Trial counsel's representation of Petitioner was therefore unreasonable and also resulted in the denial of Petitioner's Fifth Amendment right to expert assistance in developing mental-health related mitigating factors.

(c) Prejudice Caused By Counsel's Unreasonable Representation

Trial counsel either conducted an unreasonable investigation that resulted in his failure to ask for a mental health expert, or merely failed to ask for an expert after conducting a reasonable investigation that revealed evidence alerting him to the need for such an expert. Under either scenario, trial counsel acted unreasonably in failing to ask for such an expert. In light of the evaluations before us, there is a reasonable probability that a mental health expert would have aided Petitioner in his investigation, development, and presentation of mitigating evidence, and that denial of such expert assistance resulted in an unfair penalty phase trial, because there is a reasonable probability that a juror would have weighed the aggravating and mitigating factors differently. Therefore trial counsel's failure to ask for a mental health expert resulted in prejudice to Petitioner, and we hold that trial counsel thus rendered unconstitutionally ineffective assistance.

The jury found that mitigating factors (e)(1), no significant history of prior convictions, and (e)(8), character and record of defendant and the circumstances of his offense, as well as the aggravating factors (d)(2), contract killing,[135] and (d)(8), torture,[136] applied. The jury weighed the aggravating and mitigating factors and imposed the death penalty.

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135 "The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim." 42 Pa. Cons. Stat. § 9711(d)(2).

136 "The offense was committed by means of torture." 42 Pa. Cons. Stat. § 9711(d)(8).

The standard for showing prejudice in challenging a death sentence is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. at 695. In making this determination, we "must consider the totality of the evidence" before the jury. *Id.* In Pennsylvania, the jury is not required to find mitigating circumstances unanimously. *See* 42 Pa. Cons. Stat. § 9711 (c)(1)(iv); *Commonwealth v. Wayne*, 720 A.2d 456, 468-69 (Pa. 1998). Therefore if there is a reasonable probability that, but for counsel's error, one or more jurors would have given more weight to the (e)(8) mitigating circumstance or found one or more additional mitigating circumstances, then there is a reasonable probability that the jury would have weighed the aggravating and mitigating circumstances differently and concluded that they did not warrant death. *See Strickland*, 466 U.S. at 695.

One of the experts who examined Petitioner in 1996, licensed psychologist Harry Krop, Ph.D., concluded in his evaluation of Petitioner that "there are several mitigating factors that should have been explored and presented at the time of Mr. Holloway's trial." (Pet. App. 12.) Because the Commonwealth stipulated to the findings of Dr. Krop and the other experts, and this is such a finding based on his reasoned professional judgment, and because the Commonwealth has not presented psychological evidence to the contrary, we accept his statement as true. In doing so, we are forced to conclude that if these mitigating factors had been explored and presented as Dr. Krop suggests, there is a reasonable probability that Petitioner may have had a stronger argument for mitigation and thus a different sentence. On this basis alone we could find that trial counsel's deficient performance

prejudiced Petitioner's case. *See Holland v. Horn*, – F. Supp. 2d –, No. 99-CV-2551, 2001 WL 704493, *32 (E.D. Pa. Apr. 25, 2001) (finding prejudice based on an mental health expert's conclusion that "counsel's failure to challenge the denial of a defense mental health expert created a reasonable probability that, but for this omission, Petitioner may have been afforded a stronger argument for mitigation and, therefore, a different sentence"). We also find, however, upon our own examination of the reports of the mental health experts in the record, that if their contents had been presented to the jury, there is a reasonable probability that the outcome of the sentencing would have been different.

Petitioner argues that his Dependent Personality disorder supports both the (e)(2) mitigating factor[137] and the (e)(5) mitigating factor[138] that Petitioner acted under the substantial domination of another person. He also argues that his chronic drug and alcohol abuse and his acute intoxication on the night of the murder support a finding of the (e)(3) mitigating factor.[139] He argues in addition that the

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137 "The defendant was under the influence of extreme mental or emotional disturbance." 42 Pa. Cons. Stat. § 9711(e)(2).

138 "The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa. Cons. Stat. § 309 (relating to duress), or acted under the substantial domination of another person." 42 Pa. Cons. Stat. § 9711 (e)(5).

139 "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." 42 Pa. Cons. Stat. § 9711(e)(3).

(e)(4) mitigating factor[140] should apply because Mr. Levitt found that because of Petitioner's age, he was unlikely to commit violent acts in the future.[141] Finally, Petitioner argues that his mental health is a factor that should have been considered under (e)(8).

A mental health expert could have offered assistance as to the investigation and development of the (e)(2), (3) and (5) mitigating factors and assisted counsel in deciding penalty phase strategy. Trial counsel's failure to present evidence on and argue (e)(2), (3) or (5) cannot be said to be unreasonable, however, even if he had had such evidence and an expert available to him. These mitigating circumstances contradict Petitioner's guilt-phase defenses of factual innocence and alibi, and counsel may, under the objectively reasonable standard we are required to apply, choose not to present such evidence because it may detract from other, uncontradicted, mitigating evidence. *See Flamer v. Delaware*, 68 F.3d 710, 734 (3d Cir. 1995) (defendant's claim of

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140 "The age of the defendant at the time of the crime." 42 Pa. Cons. Stat. § 9711(e)(4).

141 Petitioner finds no support for any claim based on his age as a mitigating factor from Mr. Levitt's report. The "age" mitigating factor applies to youth or advanced age. *See Commonwealth v. Frey*, 475 A.2d 700, 706 (Pa. 1984) (finding that defendant's age of forty-two years "when he committed the crime of murder can in no way be offered as a factor in mitigation of the seriousness of that crime"); *see also Commonwealth v. Rivers*, 644 A.2d 710, 720 (Pa. 1994) (same for defendant who was thirty-four years old at the time of the murder). Petitioner was thirty-nine years old at the time of the Caldwell homicide and thus would not have been entitled to the benefit of the (e)(4) mitigating circumstance; therefore counsel could not be ineffective for failing to present evidence on it, argue it, or request that jury be instructed on it.

innocence may restrict penalty phase arguments counsel may make in mitigation); *accord Burger v. Kemp*, 483 U.S. 776, 793-94 (1987). The Pennsylvania Supreme Court decided the failure of counsel to present evidence on (e)(5) in just this way, and we therefore find it reasonable under AEDPA.

A defendant's poor mental health may be presented as "evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." § 9711(e)(8). The United States Supreme Court has found that penalty phase juries must be afforded every opportunity to exercise their discretion in granting a sentence of life imprisonment, and thus mitigating factors such as (e)(8) are read broadly and considered to be catch-all categories. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). Therefore the jury was entitled to consider evidence as to Petitioner's mental health under this factor and give this factor more weight than it previously did if it so chose. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 393-99 (2000) (counsel ineffective at capital sentencing for failing to investigate, develop, and present mitigating evidence of defendant's traumatic childhood, mental retardation, and possible mental illness); *Eddings*, 455 U.S. at 115 ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation."); *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring) ("Evidence concerning . . . the defendant's . . . emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment.")

Counsel's deficient performance prejudiced Petitioner by depriving him of any informed presentation of mental infirmities. We are satisfied that the evidence presented by Petitioner, i.e. the reports of four mental health experts, is relevant to the (e)(8) mitigating factor, and that his lack of a

court-appointed mental health expert actually prejudiced him at the penalty phase. There is a reasonable probability that, but for counsel's error, one or more jurors would have given more weight to the (e)(8) mitigating circumstance and therefore weighed the aggravating and mitigating factors differently, and concluded "that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. In short, our confidence in the outcome is undermined by counsel's deficiency.

(4) Conclusion

We find that trial counsel's representation of Petitioner was constitutionally ineffective, violating the Sixth Amendment, because he failed to reasonably investigate Petitioner's background for mental health related issues and because he failed to request that a mental health expert be appointed to assist the defense, and Petitioner was prejudiced, in that there is a reasonable probability that, absent the unreasonable representation, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.[142] We will therefore

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[142] Although our decision as to the substantive Sixth Amendment claim is sufficient to grant the writ, were we able to examine the Fifth Amendment claim that underlies our finding that trial counsel was ineffective for failing to request that a mental health expert be appointed, we would find that the claim has merit and grant the writ on that basis as well. That is, we would also find that as a result of trial counsel's ineffective assistance, Petitioner was denied his Fifth Amendment Due Process right to a court-appointed mental health expert to assist in his defense at the penalty phase. Petitioner did not clearly or explicitly raise the Fifth Amendment issue as a separate claim in PCRA proceedings or before this Court, however. The issue was discussed primarily in

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grant the Petition for a Writ of Habeas Corpus on this basis, and order that the Commonwealth conduct a new resentencing proceeding.

b. Failure To Rebut Evidence And Argument Of Torture Aggravating Circumstance

In his second subclaim, Petitioner argues that he is entitled to habeas relief because his trial counsel was ineffective for failing to rebut the prosecution's argument that Petitioner tortured Caldwell. On direct appeal, Petitioner raised a

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(Continued)

terms of ineffectiveness of trial and direct appeal counsel, although PCRA counsel also asserted that Petitioner was entitled to an expert under *Ake* during collateral proceedings. Although Petitioner has alleged facts sufficient for us to recognize that he has a colorable Fifth Amendment claim, we must find that it was not fairly presented to the Pennsylvania Supreme Court, and is exhausted because it could not be raised there now, and is thus procedurally defaulted. If we could address this claim sua sponte, we would be required to find cause and prejudice for this default before we could review the Fifth Amendment claim on the merits. We have already determined in analyzing the substantive Sixth Amendment claim that trial counsel was ineffective for failing to request that a mental health expert be appointed; and therefore cause and prejudice would exist as to trial counsel. We believe that appellate counsel was not ineffective for failing to raise the Fifth Amendment claim. Because Pennsylvania never relaxed the waiver rule as to the need for trial counsel to contemporaneously object to trial errors, and the Fifth Amendment claim fits within that framework, appellate counsel could have only raised the claim as one of trial counsel's ineffectiveness. Therefore, he cannot be considered ineffective for failing to raise the Fifth Amendment claim, because it could not have been examined by the Pennsylvania Supreme Court directly anyway.

substantially similar claim of ineffectiveness of counsel,[143] and within that claim proceeded to allege that the Commonwealth failed to prove beyond a reasonable doubt that Petitioner had engaged in torture. In its opinion, the Pennsylvania Supreme Court separately addressed these two claims. *Holloway I*, 572 A.2d at 694. The court first held that it was not unreasonable for the jury to find that Petitioner had engaged in torture, given the evidence of strangulation presented by the prosecution. The court also held that it was not unreasonable for the jury to infer from the evidence that it was the intent of Petitioner to inflict torture. The court then addressed the claim of ineffective assistance of counsel, and found that counsel was not ineffective, relying on its previous determination that trial counsel had not acted ineffectively because the brevity of evidence offered in aid of mitigation was at the behest of Petitioner. It therefore dismissed the ineffectiveness claim as being without merit.

Having determined that this claim was fairly presented to the Pennsylvania Supreme Court and exhausted, *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999), and that the court adjudicated the claim of trial counsel's ineffective assistance on its merits, we must review that decision under the AEDPA, 28 U.S.C. § 2254(d). Doing so, we hold that the Pennsylvania Supreme Court's decisions were not an unreasonable application of, or contrary to, clearly established federal law and consequently deny relief.

As this is a ineffectiveness claim, the controlling federal law, as determined by the Supreme Court of the United States, is set forth in *Strickland v. Washington*, 466

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[143] We therefore find this subclaim to have been exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996).

U.S. 668 (1984). In order for the Pennsylvania Supreme Court to find counsel ineffective, Petitioner had to show that counsel made a serious error, and that the error caused actual prejudice. *Strickland*, 466 U.S. at 687. In making the same claim of ineffectiveness in this petition for habeas relief, Petitioner must now show that the Pennsylvania Supreme Court misapplied *Strickland* when it denied relief. While we respectfully believe that the Petitioner's waiver as to certain types of mitigating evidence and witnesses may not have extended to evidence and arguments that he did not torture Caldwell, we find that the Pennsylvania Supreme Court's decision was a reasonable application of *Strickland*, because counsel's actions were not unreasonable and did not prejudice Petitioner.

There are numerous reasonable bases for counsel's actions at trial. Counsel may have wished to refrain from an in-depth argument regarding the allegation of torture because he felt it would call extra attention to several issues he could not rebut. For example, counsel may have not been able to account for, and did not wish to call attention to, the half-hour to one-hour period in which Shirley Baker did not see Petitioner, when the prosecution alleged he was torturing Ricky Caldwell seven blocks away. Similarly, counsel may have had no explanation for or simply did not wish to draw additional attention to the abundant evidence of strangulation on the neck of the victim. In any case, it is not necessary for us to supply possible reasons for counsel's trial strategy, but rather Petitioner must show why that strategy was ineffective, and he has failed to do so.[144] Thus, we find that counsel did

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[144] We are required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

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not act unreasonably when he failed to rebut the prosecution's torture argument.[145]

We also note that Petitioner has failed to show actual prejudice. The Supreme Court has held that prejudice can be found only when counsel's errors were so serious that they deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 687. Petitioner has not demonstrated a reasonable probability that the outcome of the penalty phase deliberation would have been different had defense counsel attempted to rebut the prosecutor's argument.

We conclude that the Pennsylvania Supreme Court's ruling was neither contrary to nor an unreasonable application of, clearly established federal law. Accordingly,

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(Continued)

presumption that under the circumstances the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Petitioner fails to overcome this strong presumption.

[145] We also note that Petitioner currently alleges record evidence that could have been pointed out by trial counsel to rebut the allegation of torture. Such evidence is completely unpersuasive in light of other evidence in the record. Further, even if we believed that an evidentiary hearing were warranted to develop this claim, we could not hold one. Such development of the facts should have been done at the PCRA hearing. Petitioner makes no attempt to show that he did not "fail" to develop such facts within the meaning of 28 U.S.C. § 2254(e)(2). Because he does not appear to have developed the facts of this claim for habeas relief, and there is no adequate excuse for such failure, we may not hold such a hearing. 28 U.S.C. § 2254(e)(2).

under AEDPA review, we deny Petitioner relief on this subclaim.[146]

c. Affirmatively Harmful Argument Made By Trial Counsel

In his third subclaim, Petitioner argues that he is entitled to habeas corpus relief because his trial counsel was ineffective for making an affirmatively harmful argument. Petitioner argues that trial counsel's statement that Petitioner would be eligible for parole in twenty years provided the jury with erroneous information that prejudiced Petitioner and may have led the jury to opt for a death sentence.

Petitioner's claim of ineffective assistance of counsel for making an affirmatively harmful argument was raised to the PCRA hearing court and on PCRA appeal in a form substantially similar to the instant claim, and having thus been fairly presented to the Pennsylvania Supreme Court, it is exhausted and properly before us. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). As it did with the first subclaim, the Pennsylvania Supreme Court dismissed this claim as previously litigated in *Holloway II*, but we respectfully believe that this claim was not presented to the Pennsylvania Supreme Court on direct appeal. Because this subclaim was not presented on direct appeal and is not a logical extension of any claim raised on direct appeal, it cannot be said to have been adjudicated on its merits by the Pennsylvania Supreme Court. *See Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000); Part III B. 3., *supra*. Because the claim has been exhausted but was not adjudicated on the merits, we review

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146 As our foregoing analysis indicates, we would also deny relief were we to review the claim de novo.

the claim de novo. *See Id.*; *see also Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). We find that counsel was not ineffective under *Strickland*, and consequently deny relief on this claim.

During penalty phase arguments, defense counsel stated that Petitioner would be eligible for parole in 25 to 30 years:

> The sentence choices you have are between life and death, the life sentence carries approximately twenty something years, maybe a little longer, before someone would even be eligible. My client's age, he's forty-four years old, so you're talking taking away twenty something years, twenty-five, thirty years.

(N.T. 5/22-5/23/86 at 34.) Petitioner argues that the potential release of a defendant weighs heavily on the minds of jurors choosing between life imprisonment and death. He argues that juries are more likely to sentence a defendant found guilty of capital murder to death when there is a possibility of parole. Petitioner concludes that trial counsel's error constituted ineffective assistance because it gave erroneous and prejudicial information to the jury.

In order to find ineffective assistance of counsel, there must be both error and actual prejudice at trial. *Strickland*, 466 U.S. at 687. We see nothing unreasonable about counsel addressing head on possible concerns about parole that the jury might have, by pointing out that Petitioner was forty-four years old and would, at a minimum, be in his

sixties before he was even eligible to *apply* for release.[147] Thus, we find that counsel's argument was not error.

Furthermore, we find that there was no actual prejudice caused by counsel's argument. The jury was directed to accept the law as the judge gave it to them (N.T. 5/21/86 at 105), and the trial judge instructed the jury that the choices for punishment were only between life imprisonment and death (N.T. 5/22-5/23/86 at 58). Together, these instructions corrected any mistaken impressions a juror might have had. Petitioner fails to show, in light of these instructions, a reasonable probability that, but for counsel's argument, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Finding neither error nor actual prejudice, as required under *Strickland*, we deny relief on this subclaim.

d. Failure To Object To Improper Argument By The Prosecutor

In his fourth subclaim, Petitioner argues that he is entitled to habeas corpus relief because his trial counsel was ineffective for failing to object to the prosecutor's improper argument during the penalty phase. Specifically, Petitioner claims that the prosecutor's statements referring to Petitioner as a drug dealer served as a de facto aggravating factor, which in turn led the jury to apply the death penalty, and that trial counsel's failure to object to this statement was ineffective.

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147 While it is true that prisoners do not have an automatic right to parole, they can apply for commutation of sentence and in the past, it is well known that depending upon the administration in office in Harrisburg, such commutations have been granted.

Petitioner's claim of ineffective assistance of counsel for failing to object to the prosecutor's improper argument was raised to the PCRA hearing court and on PCRA appeal in a form substantially similar to the instant claim, and having thus been fairly presented to the Pennsylvania Supreme Court, it is exhausted and properly before us. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). As it did with the first and third subclaims, the Pennsylvania Supreme Court in *Holloway II* dismissed this claim as previously litigated on direct appeal, but we respectfully believe that the Pennsylvania Supreme Court did not adjudicate the claim then, because it was not raised and was not a logical extension of any claim raised then. Therefore, this subclaim cannot be said to have been adjudicated on its merits by the Pennsylvania Supreme Court. *See Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000); Part III. B. 3., *supra*. Because the claim has been exhausted but was not adjudicated on the merits, we review the claim de novo. *See id.*; *see also Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). We deny relief for this claim because Petitioner demonstrates neither the error nor prejudice required of a claim of ineffective counsel under *Strickland*.

Petitioner specifically objects to the prosecutor's statement during penalty phase arguments that referred to the effect Petitioner's drug trade had on his community:

> Defense sees fit to talk about the father figure. Defense sees fit to state how he has touched lives. Think about all the lives he has touched. Think about all the people that he sold drugs to. Think about how many potential destroyed lives are walking around the city and county of Philadelphia because of the

> business, and make no mistake about it, the business this defendant was in.

(N.T. 5/22-5/23/86 at 42-43). Petitioner maintains that the prosecutor's argument amounted to the creation of an aggravating factor not authorized by statute, and thus illegal under Pennsylvania law. Petitioner concludes that it was ineffective for his trial counsel to fail to object to this argument. The Commonwealth argues that the prosecutor was merely rebutting defense counsel's assertion that Petitioner was a man of good moral character, thus there was no cause for defense counsel to object.

Under *Strickland*, we must first determine if counsel's failure to object was error. In order to determine if an objection was required, we must first consider if the prosecutor's conduct was objectionable. The record discloses that in the penalty phase arguments, defense counsel argued that the good character of Petitioner was a mitigating factor, portraying Petitioner as a family man, both by calling his wife to the stand and referencing his family in closing arguments. (N.T. 5/22-5/23/86 at 29-32, 34, 36). We find that the statements of the prosecutor were made to refute defense counsel's argument that Petitioner had good character. The idea of "fair response," which allows a party to respond to statements made by opposing counsel, is well-established federal law. *United States v. Robinson*, 485 U.S. 25, 32 (1988). Under this standard, it is clear that the prosecutor's statement did not warrant an objection from defense counsel, thus there was no error as required by *Strickland*.[148]

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[148] In addition to complying with the invited response doctrine of *Robinson*, the prosecutor's statement does not amount to prosecutorial misconduct as defined in *Greer v. Miller*, 483 U.S. 756, 765 (1987).

Even if we were to conclude that defense counsel's failure to object was error, we would find that no prejudice resulted. The Supreme Court has held that prejudice can be found only when counsel's errors were so serious that they deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 687. Petitioner has not demonstrated a reasonable probability that the outcome of the penalty phase deliberation would have been different had defense counsel objected to the prosecutor's argument. Indeed, the prosecutor's statements revealed nothing new about Petitioner or Petitioner's character. Petitioner himself had already candidly admitted that he was a drug dealer. (N.T. 5/20/86 at 116-117). We find that no prejudice resulted from defense counsel's failure to object. Consequently, we deny relief on this subclaim.

11. Claim XI–Faulty Jury Instructions Implying Need For Unanimity In Finding Mitigating Circumstances

Petitioner challenges the jury instructions given on finding and weighing mitigating and aggravating circumstances as erroneous in that they led the jury to believe that it had to be unanimous in finding any mitigating circumstance before that mitigating circumstance could be given effect, thus creating a barrier to the jury's consideration of all mitigating evidence in violation of the Eighth and Fourteenth Amendments. He also claims that the trial court erred by failing to instruct the jury that any individual who individually found a mitigating circumstance could weigh that circumstance against the aggravating factors unanimously found, even if there was not unanimity as to the existence of that mitigating circumstance. He claims that trial counsel was ineffective for failing to object and seek a proper instruction, and that direct appeal counsel was ineffective for failing

to raise and litigate this issue on the merits or as one of trial counsel's ineffectiveness.

In one of his many filings to the PCRA hearing court and on PCRA appeal, Petitioner raised the due process claim on the merits. He also raised claims of trial counsel's ineffectiveness for failing to request the jury instructions and of direct appeal counsel's ineffectiveness for failing to raise the claim of trial counsel's ineffectiveness or raise the claim on the merits. We therefore find that the claims before us were fairly presented to the Pennsylvania courts and are thus exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). Because trial counsel failed to object to the instruction given or request an instruction like the one Petitioner alleges should have been requested, the Pennsylvania Supreme Court deemed the due process claim to have been waived. *Commonwealth v. Holloway* (*Holloway II*), 739 A.2d 1039, 1044 (Pa. 1999) (citing *Commonwealth v. Williams*, 660 A.2d 1316 (1995)). Further, because neither the due process claim nor the claim of trial counsel's ineffectiveness were raised previously, the Supreme Court of Pennsylvania deemed them to be waived pursuant to PCRA's procedural rules.[149] Because Petitioner alleged ineffectiveness of all prior counsel, however, the court adjudicated the claim from the standpoint of a ineffectiveness claim. *See Id.* We must therefore do so as well, applying the AEDPA standard, deciding

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[149] We have previously found that both of these bases for the waiver are independent and adequate state grounds barring our review of the underlying substantive claim, and we now find that they were properly applied to this claim. Therefore, to review the due process claim on the merits, we would be required to find cause and prejudice or a fundamental miscarriage of justice to excuse the procedural default. *See* Part III. B. 2, *supra*.

whether the Pennsylvania Supreme Court's adjudication of the ineffectiveness claims resulted in a decision that was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court, i.e. of *Strickland v. Washington*, 466 U.S. 668 (1984). *See* 28 U.S.C. § 2254(d)(1).

On PCRA appeal, and before us, Petitioner claimed that the instructions given, and the failure to give an appropriate instruction, precluded the jury from considering and giving full effect to mitigating circumstances, in violation of *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988). Under *Mills*, one of the ways that the jury may be precluded from considering and giving full effect to mitigating evidence is through jury instructions that may lead "members of the jury to believe that a particular mitigating circumstance could not be considered unless there was unanimous agreement regarding proof of that circumstance." *Frey v. Fulcomer*, 132 F.3d 916, 919 (3d Cir. 1997). Such instructions create a "barrier to the sentencer's consideration of all mitigating evidence" in violation of the Eighth Amendment. *Mills*, 486 U.S. at 375.

In deciding the ineffectiveness claims before it, the Pennsylvania Supreme Court considered whether counsel could have been ineffective for failing to object to instructions that violated *Mills*, or request instructions that complied with *Mills*. The court found that *Mills* was decided two years after Petitioner's trial, and therefore trial counsel could not be ineffective, because counsel is not required to anticipate changes in the law. *Holloway II*, 739 A.2d at 1046.

We agree with the decision of the Pennsylvania Supreme Court, and therefore find that it was neither contrary

to, nor an unreasonable application of, *Strickland*. Counsel is not required to be prescient.[150] *See, e.g., Sistrunk v. Vaughn*, 96 F.3d 666, 671 (3d Cir. 1997) (holding that direct appeal

[150] We agree that direct appeal counsel had the benefit of *Mills*. However, because trial counsel failed to preserve the claim, and waiver caused by the failure of trial counsel to contemporaneously object or request instructions was never relaxed in Pennsylvania, even for death penalty cases, *see Commonwealth v. Williams*, 660 A.2d 1316, 1319-1320 (Pa. 1995) and cases cited therein, direct appeal counsel could have only raised the claim as one of trial counsel's ineffectiveness. Because that claim has no merit, direct appeal counsel could not be ineffective for failing to raise it. *Strickland*, 466 U.S. at 691. Even if we were to accept the argument that direct appeal counsel could have brought the *Mills* claim in the first instance, because it was decided before Petitioner's appeal was filed, that claim is still defaulted because the Pennsylvania Supreme Court applied the PCRA bar of 42 Pa. Cons. Stat. §§ 9543(a)(3) and 9544(b). The only "cause"possible to overcome appellate counsel's failure to raise the claim could be appellate counsel's ineffectiveness. To support such an allegation, Petitioner merely alleges "Appellate counsel's failure to recognize that Petitioner had a winning *Mills* claim and include it in the appeal was deficient performance." (Reply Br. at 77-78.) Such an allegation is insufficient to overcome the presumption of reasonableness that we must accord to the decisions of counsel, *see Strickland*, 466 U.S. at 689, or to satisfy the difficult standard required to show that appellate counsel was ineffective for failing to raise a claim, *see, e.g., Jones v. Barnes*, 463 U.S. 745 (1983) (holding that appellate counsel who files a merits brief is not required to raise every nonfrivolous claim, and indeed should not do so, but rather may select from among them to try to maximize the likelihood of success on appeal); *Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("[While] it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, . . . it is difficult to demonstrate that counsel was incompetent. . . . [Petitioner must show] "that [the] particular nonfrivolous issue was clearly stronger than issues that counsel did present.").

counsel could not have been ineffective for failing to raise a *Batson*-type claim before *Batson* had been decided by the Supreme Court); *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989) ("There is no general duty on the part of defense counsel to anticipate changes in the law.") Further, because we agree that counsel could not have been ineffective for failing to object or request an instruction that complied with *Mills*, we would not be able to find cause to excuse the procedural default that bars us from examining the merits of the due process claim. We therefore find that Petitioner is not entitled to relief on any claim based on the jury instructions as to finding mitigating circumstances unanimously or individually.

12. Claim XII--Improper Application Of The Torture Aggravating Circumstance

Petitioner claims that two constitutional violations occurred by an improper application of 42 Pa. Cons. Stat. § 9711(d)(8), the aggravating circumstance that "the offense was committed by means of torture." He claims that the trial court failed to provide a limiting instruction and that there was insufficient evidence to prove § 9711(d)(8).

a. Failure To Provide A Limiting Instruction

At his PCRA proceedings and in his petition for a writ of habeas corpus, the Petitioner claimed that the trial court's failure to provide the jury with a limiting instruction to guide the jury in its interpretation on the meaning of (d)(8) resulted in a violation of his Sixth, Eighth, and Fourteenth Amendment rights. The Petitioner did not expressly bring this claim on direct appeal. However, in *Holloway I*, the Pennsylvania Supreme Court made clear that the evidence was sufficient to establish that Petitioner intended to and did

torture the victim. *Holloway I*, 572 A.2d at 694 ("The jury could find that the strangulation was but a cruel prelude to an intended denouement by [a shot gun] . . . it was the intent of both the appellant and co-defendant to first torture the victim."). In its PCRA appeal opinion, the Pennsylvania Supreme Court declined to consider whether (d)(8) required a limiting instruction, stating that it already decided the issue in *Holloway I*. We find that the Petitioner fairly presented this claim to the Pennsylvania courts and that the Pennsylvania Supreme Court issued an adequate decision concerning Petitioner's limiting instruction claim in *Holloway I*. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). Thus, we must analyze the Pennsylvania Supreme Court's decision concerning Petitioner's claim under the standard of review established in the AEDPA, and in doing so, we find that the decision of the Pennsylvania Supreme Court was neither contrary to, nor an unreasonable application of, clearly established federal law.[151] 28 U.S.C. § 2254(d)(1).

The Petitioner bases this subclaim on a line of U.S. Supreme Court cases that held that if a state wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty, and thus it must define the crime for which the death may be imposed in a way that obviates standardless sentencing discretion. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality); *Profitt v. Florida*, 428 U.S. 242 (1976) (plurality); *Gregg v. Georgia*, 428 U.S. 153, 196 (1976) (plurality); *Furman v. Georgia*,

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151 As our analysis *infra* indicates, were we to review the issues in this subclaim de novo, Petitioner would not be entitled to relief.

408 U.S. 238 (1972) (per curiam) (sentencing jury's discretion must be "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

In *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the five concurring opinions concluding that the imposition and carrying out of the death penalty in the three cases before the Court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments were all based at least in part on the fact that the judges or juries had nearly unbridled discretion in imposing the death penalty. The juries in the three cases reviewed in *Furman* were not presented with aggravating or mitigating circumstances to help determine whether the death penalty was an appropriate sentence.

In *Gregg v. Georgia*, a plurality of the Court relied on *Furman* to decide that Georgia's capital sentencing procedures did not violate the Eighth and Fourteenth Amendments because the aggravating and mitigating circumstances provided allowed the jury to focus on the particularized nature of the crime and the particularized characteristics of the individual defendant. 428 U.S. 153 (1976). Additionally, the plurality found that the jury's discretion was channeled because the jury found and identified at least one statutory aggravating factor before the jury was able to impose the death penalty, and the mandatory review by the Georgia Supreme Court provided an additional safeguard to assure that the death penalty would not be imposed on "a capriciously selected group of convicted defendants." *Id.* at 204-206.

In *Godfrey v. Georgia*, a plurality of the U.S. Supreme Court reversed and remanded the Georgia Supreme Court's decision to uphold a jury's decision to impose the death penalty for a murder that met a Georgia statute's

aggravating circumstance that imposed the death penalty if proven beyond a reasonable doubt that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," because the plain language of the statute did not provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Godfrey*, 446 U.S. at 427 (quoting *Gregg*, 428 U.S. at 188 (citations omitted)). The *Godfrey* plurality concluded that this broad use of language resulted in too much discretion for the jury, and lacked a principled basis for the jury to decide the death penalty. *Id.* at 428-433.

Although we recognize that juries must not be arbitrary and capricious when imposing the death penalty, we do not agree with the Petitioner that the jury's decision to impose death in the instant case was arbitrary and capricious. *See Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). Petitioner's jury found two aggravating and two mitigating circumstances and weighed them against each other before it imposed the death penalty, therefore their discretion was channeled as *Gregg* requires, 428 U.S. at 206, and the jury was adequately guided so as to avoid a "wanton" and "freakish" death penalty decision, *see Furman*, 408 U.S. at 310 (Stewart, J., concurring). Additionally, the Pennsylvania Supreme Court, in accordance with 42 Pa. Cons. Stat. § 9711(h)(3)(i), had a mandatory obligation to review the jury's sentencing decision, which provided additional assurance that this penalty was appropriate and not disproportionate to the crime. Thus, following the *Gregg* decision, the trial court's death penalty decision and review of that decision by the Pennsylvania Supreme Court did not offend the federal Eighth and Fourteenth Amendments.

Furthermore, we find that allowing the jury to determine whether the evidence presented in the case amounted to torture without a limiting instruction did not give it so much discretion as to violate the Petitioner's Eighth and Fourteenth Amendment rights. At the time of the Petitioner's trial, the Pennsylvania Supreme Court had decided that the general meaning of "torture" was not constitutionally vague and its meaning is a "matter of common knowledge." *See Commonwealth v. Pursell*, 495 A.2d 183, 196 (Pa. 1985). Thus, we find that the decision of the Pennsylvania Supreme Court allowing the jury to impose the death penalty based on the plain language of aggravating circumstance (d)(8) was not contrary to any existing federal law.

The Petitioner goes on to argue that the death penalty as applied to him violated his Eighth Amendment rights because the law concerning aggravating circumstance (d)(8) changed in *Commonwealth v. Nelson*, 523 A.2d 728 (Pa. 1987), to require a limiting instruction. Petitioner cites *Wade v. Calderon*, 29 F.3d 1312, 1319-20 (9th Cir. 1994) to argue that, similar to the decision reached in *Nelson*, the Ninth Circuit of the United States Court of Appeals also agreed that the torture aggravating circumstance requires a limiting instruction regarding the defendant's intent to cause pain and suffering in addition to the intent to kill.[152] While it is true that the law in Pennsylvania changed to require a limiting instruction to aggravating circumstance (d)(8), Pennsylvania Supreme Court decisions that preceded *Holloway I* were not necessarily binding on that court under the doctrine of *stare*

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[152] Besides not being bound by Ninth Circuit decisions, we find that the California provision at issue in *Wade* differs from § 9711(d)(8). The statutory language of California's aggravating circumstance requires "proof of the infliction of extreme physical pain no matter how long its duration." *Wade*, 29 F.3d at 1319.

decisis. *See Holland v. Horn*, – F. Supp. 2d –, No. 99-CV-2551, 2001 WL 704493, *57-58 (E.D. Pa. Apr. 25, 2001); *see also Smith v. Horn*, 120 F. 3d 400, 414 (3d Cir. 1997) ("A state court's misapplication of its own law, in and of itself, cannot be corrected by a federal court. However . . . [a] resulting federal constitutional error can be corrected by a federal habeas court.") (citing *Gilmore v. Taylor*, 508 U.S. 333, 348-49 (1993) (O'Connor, J., concurring)). Also, following *Holloway I*, the Pennsylvania Supreme Court held that a limiting instruction is not required for (d)(8) when it is established that there is sufficient evidence to find that the defendant intended to torture the victim. *See Commonwealth v. Fahy*, 645 A.2d 199, 202-203 (1994); *see also Commonwealth v. Whitney*, 708 A.2d 471, 480 (1998) (finding that there was sufficient evidence to find torture despite jury instruction being limited to language of statute). The Pennsylvania Supreme Court, in *Commonwealth v. Ennis*, 574 A.2d 1116 (1990), held that "where the evidence of the case supports the omitted jury instruction, the failure to define the element to the jury is not prejudicial." In *Holloway I*, the Pennsylvania Supreme Court made it clear that there was sufficient evidence to find that the Petitioner intended to torture the victim. 572 A.2d at 694. Therefore, providing the jury with the instruction established in *Nelson* would have only made it more clear that the Petitioner intended to torture the victim with a ligature before he decided to kill him with a shotgun blast to the head. Thus, we find that the Pennsylvania Supreme Court was reasonable in upholding the trial court's decision to affirm the death penalty based on the plain language of (d)(8) and we deny Petitioner's claim as to this issue.

The Petitioner also makes the subclaim that the failure of both his trial and appellate counsel to request a limiting instruction to aggravating circumstance (d)(8) was a

violation of his Sixth and Fourteenth Amendment rights. We disagree. The Pennsylvania Supreme Court's decision in *Nelson* was issued after the Petitioner's trial. We cannot find trial counsel ineffective for failing to predict the change in law in Pennsylvania regarding (d)(8). *See Sistrunk v. Vaughn*, 96 F.3d 667, 670-671 (1996); *Flamer v. Delaware*, 68 F.3d 736, 756-57 (1995); *Senk v. Zimmerman*, 886 F.2d 611, 615-616 (1989). We find that Petitioner's appellate counsel cannot be found ineffective following the standard established in *Strickland*, which requires us to presume that counsel acted reasonably. Here, the established evidence strongly demonstrated that Petitioner intended to torture the victim before he decided to kill him. Therefore, it is not reasonably probable that the outcome of the Petitioner's direct appeal would have been different if the *Nelson* limiting instruction had been provided. Counsel cannot be unreasonable for deciding not to raise a meritless or weak claim. *Strickland*, 466 U.S. at 691; *Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("[Petitioner must show] that [the] particular nonfrivolous issue was clearly stronger than issues that counsel did present."). Thus, we find that neither trial counsel's nor appellate counsel's performance was deficient, and we deny Petitioner's ineffective assistance of counsel claim arising from the failures of trial counsel to request a limiting instruction.

b. Insufficiency Of The Evidence

On direct appeal, at his post conviction relief proceedings, and in his petition for habeas corpus, the Petitioner claimed that there was insufficient evidence to establish aggravating circumstance (d)(8), and thus the jury's decision to impose the death penalty violated his Eighth and Fourteenth Amendment rights. We find that Petitioner fairly presented this claim at the state level and has exhausted his

opportunity to all remedies available to him regarding this claim. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). The Pennsylvania Supreme Court decided that there was sufficient evidence presented to establish that both Petitioner and co-defendant intended to first torture the victim before killing him, *see Holloway I*, 572 A.2d at 694, and declined to reconsider its decision at Petitioner's PCRA appeal, finding the issue previously litigated, *see Holloway II*, 739 A.2d at 1043-1044. Therefore, we use the AEDPA standard of review to analyze the Pennsylvania Supreme Court's decision on direct appeal.

In *Holloway I*, the Pennsylvania Supreme Court used testimonial evidence from Shirley Baker and an unsigned statement made by the Petitioner to conclude that Petitioner and Freeman intended to torture Caldwell. The *Holloway I* court found that the length of time it took to kill the victim and the use of a ligature to engage in a "tug-of-war" action to strangle the victim were deciding factors in concluding that Caldwell was first tortured before he was killed by shotgun blasts to his head. *See Holloway I*, 572 A.2d at 694. Under the AEDPA standard, we find the Pennsylvania Supreme Court's decision as to the sufficiency of the evidence to establish (d)(8) was reasonable. Furthermore, we find that Petitioner's argument that (d)(8) could not be established because the victim was unresponsive from the use of sleeping pills is not persuasive. Baker's testimony was that Johnson said that the victim was "high on pills," not that he was unresponsive or unconscious. Further, a medical examiner testified on cross-examination that a toxicology report on the victim did not show drugs in the victim's system. (N.T. 5/19/86, 61-62.) In either case, he would have been aware of the infliction of pain and the intent to inflict pain upon him. The established evidence thus allows a reasonable jury to

find that Petitioner intended to inflict pain and suffering on the victim. Therefore, we find that the Pennsylvania Supreme Court's decision as to the sufficiency of the evidence was reasonable and deny Petitioner's claim.[153]

13. Claim XIII–Improper Application Of The Contract Killing Aggravating Circumstance

The Petitioner claims three constitutional violations occurred by an improper application of 42 Pa. Cons. Stat. §9711(d)(2), the aggravating circumstance that the "defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim." These claims are as follows: (1) failure to provide a limiting instruction to the jury, (2) insufficient evidence to prove (d)(2) beyond a reasonable doubt, and (3) retroactive alteration of the proof required for (d)(2), in violation of Due Process and the Ex Post Facto Clauses.

a. Failure To Provide A Limiting Instruction

At his PCRA proceedings and in his petition for a writ of habeas corpus, the Petitioner claimed that the trial court's failure to provide the jury with a limiting instruction to guide it in its interpretation on the meaning of aggravating circumstance (d)(2) was a violation of his Sixth, Eighth, and Fourteenth Amendment rights. In its PCRA decision, the Pennsylvania Supreme Court appears to have incorrectly stated that it had already addressed this claim during the Petitioner's direct appeal, and decided that Petitioner was not

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[153] Were we to examine this claim de novo we would reach the same conclusion.

entitled to post conviction relief on this claim. We find that under either a de novo standard or under the AEDPA standard of review,[154] however, this subclaim lacks merit and must be dismissed.

As he did with a similar subclaim in Claim XII, the Petitioner bases this subclaim on a line of U.S. Supreme Court cases that held that if a state wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty, and thus it must define the crime for which the death penalty may be imposed in a way that avoids standardless sentencing discretion. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality); *Profitt v. Florida*, 428 U.S. 242 (1976) (plurality); *Gregg v. Georgia*, 428 U.S. 153, 196 (1976) (plurality); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). Additionally, the Petitioner cites *Commonwealth v. Burgos*, 610 A.2d 11 (Pa. 1992), to argue that the Pennsylvania Supreme Court ruled that a limiting instruction is required for aggravating circumstance (d)(2). We have analyzed Petitioner's claim based on the Pennsylvania Supreme Court's decision in *Burgos* and on U.S. Supreme Court precedent and we conclude that the Petitioner's claim is meritless.

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154 We believe that we should review the claim de novo. We respectfully believe that the Pennsylvania Supreme Court erred finding that the claim was previously litigated, and thus the procedural bar of 42 Pa. Cons. Stat. § 9544(a) would not be adequate so as to bar our review, and because the claim was never adjudicated on the merits, we would exercise plenary review. *See* Part III. B. 3., *supra*.

The Pennsylvania Supreme Court's decision in *Burgos* does not stand for the proposition that juries must be provided with a limiting instruction regarding aggravating circumstance (d)(2). The *Burgos* court merely stated that (d)(2) should not have been submitted to the jury because the prosecution did not prove beyond a reasonable doubt the elements of (d)(2) based on the statute's plain language. Additionally, the *Burgos* court ruled that the plain language of (d)(2) does not apply to collections on a life insurance policy, or to mere "killings for pecuniary gain." The *Burgos* ruling specified that (d)(2) is satisfied when one is paid for the act of committing a murder. In *Burgos*, the insurance company did not pay the defendant for the act of killing the defendant's wife. Instead, the insurance company paid the defendant because of the nature of the insurance policy that the defendant took out on his wife's life. Hence, the *Burgos* court made clear that collecting on an insurance policy due to the death of a victim is a realization of mere pecuniary gain. Here, the Petitioner did not realize a mere pecuniary gain as a result of the victim's death. Rather, the Petitioner was paid for carrying out his job duties, which included the act of killing the victim. Furthermore, the Pennsylvania Supreme Court's decision in *Commonwealth v. Fahy* provides further support for our decisions that (d)(2) does not require a limiting instruction and that the trial court did not err by deciding not to provide the jury with such an instruction. 516 A.2d 689, 698 (Pa. 1986) ("Appellant's contention that 42 Pa Cons. Stat. A. 9711(d) is vague and overbroad is dismissed as being meritless.").

The failure to provide a limiting instruction does not run afoul of U.S. Supreme Court precedent limiting sentencing discretion, either. In the instant case, the jury was presented with both aggravating and mitigating circumstances, and therefore, the jury was not left with the same unguided

discretion as the trial juries in *Furman*. 408 U.S. 238 (1972). Here, it can be reasonably found that (d)(2)'s plain language directed the jury on the specific circumstances of the crime. The jury was adequately instructed that killing for pay and torture could provide an adequate basis to meet the statutory aggravating circumstances used to impose the death penalty. (N.T. 5/23/86 at 56-63.) The jury was also instructed on the Petitioner's lack of criminal background and any other evidence concerning the character and record of the defendant and the circumstances of the offense as a basis to meet the statutory mitigating circumstances. *Id.* The jury was then instructed that it should balance these mitigating circumstances against any aggravating circumstances that are found, and that the death penalty is an appropriate sentence if the aggravating circumstances outweigh the given mitigating circumstances. *Id.* This guided instruction was not present in *Furman*, and was exactly what the Supreme Court had in mind when it stated that decisions lacking this type of guided instruction produce "wanton" and "freakish" impositions of the death penalty. *See Furman*, 408 U.S. at 310 (Stewart, J., concurring). Here, we find that the trial court adequately instructed the jury in whether or not the death penalty could be imposed on the Petitioner. Thus, we find that the trial court did not violate the lack of guidance concerns expressed in *Furman*.

As discussed previously in Claim XII, in Part III. C. 12. a., *supra*, the jury's discretion was channeled because it imposed the death sentence based on two aggravating circumstances and two mitigating circumstances that it weighed against each other. *See Gregg*, 428 U.S. at 206 (stating that "[w]hile the jury is permitted to consider any aggravating circumstance . . . it must find and must identify at least one statutory aggravating factor before it may impose a penalty of death). Thus, following the *Gregg* decision, the trial court's

death penalty decision and review of that decision by the Pennsylvania Supreme Court did not offend the federal Eighth and Fourteenth Amendments.

Neither does the plain language of aggravating circumstance (d)(2) present a problem similar to that in *Godfrey*. 446 U.S. 420 (1980). Section (d)(2) means what it says, that this aggravating circumstance may be found if "the defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim." This plain language does not create such broad discretion that would create a cruel or unusual punishment in a violation of a defendant's Eighth Amendment rights, nor does it lack a principled basis from which the jury can decide a death penalty. Here, the plain language of (d)(2) allowed the jury to correctly find that Petitioner was a paid employee of Johnson, and that Petitioner killed the victim as a requirement of his job description. This type of killing meets (d)(2)'s plain language, and allows for the death sentence. Thus, the decision reached in *Godfrey* supports our finding that imposing the death penalty based on the plain language of (d)(2) did not violate the Petitioner's Eighth and Fourteenth Amendment rights.

The Petitioner also claims that the trial court erred by allowing the prosecutor to create the impression that the jury could find (d)(2) "on the basis that Petitioner subjectively thought killing the victim would result in a pecuniary gain for him." (Pet. Mem. L. at 82.) The Petitioner claims that the quote "Do your job" allowed for an inference that by killing the victim the Petitioner would realize a pecuniary gain of more money and drugs. However, "Do your job" can mean just what it says, for the Petitioner to fulfill his duty to kill as Johnson's employee. As stated above, (d)(2) was drafted

specifically to impose the death penalty for murders that were paid for by another person. Petitioner did not kill the victim for the expectation of receiving more money, or to collect the proceeds from an insurance policy. The Petitioner killed the victim because his job required him to kill the victim. Also, similar to most employees, or quasi-employees, Petitioner was paid for his work. Therefore, we find that allowing the trial jury to hear Johnson's instruction to Petitioner, "Do your job," did not falsely create an impression that Petitioner killed the victim with the expectation of receiving a mere pecuniary gain. Thus, we dismiss as meritless Petitioner's claim that the trial court erred by allowing the prosecutor's description of (d)(2) to be read to the trial jury.

Additionally, the Petitioner claims that his Sixth Amendment right to effective assistance of counsel was violated because Petitioner's trial counsel did not object to either the lack of a limiting instruction or to the trial court's decision to allow the prosecution to use the statement "do your job" as a way to describe the killing to meet aggravating circumstance (d)(2). We find that the trial counsel's decision not to object was reasonable under *Strickland*, which states that the proper standard for judging attorney performance is that of reasonably effective assistance in light of the totality of the evidence before the court. 466 U.S. at 687-88. Here, the totality of the evidence shows that Petitioner's attorney provided reasonably effective assistance. The *Burgos* decision that § 9711(d)(2) did not apply to killings for pecuniary gain was made after *Holloway I*. Thus, this objection was unavailable to Petitioner's trial counsel. However, even if the *Burgos* decision had been available at the time of Petitioner's trial, it is unlikely that the jury would have found that defendant killed the victim for merely pecuniary gain, and as a result, produced a contrary decision. The evidence presented to the jury did not provide a sufficient basis for it to

conclude that Petitioner killed the victim with the expectation of receiving additional money from Johnson. Rather, the evidence allowed for the more credible finding that Petitioner killed the victim as part of his job requirements as a drug dealer for Johnson. Furthermore, it is possible to find that the Petitioner's trial counsel did not object to a lack of a limiting instruction because such instruction may have resulted in making more clear that killings made in employment scenarios fit the types of killings that were intended to receive the death penalty. As stated by the Pennsylvania Supreme Court in *Holloway I*, "to kill for pay does not require a specified amount in the agreement. The consideration may be what suits the purposes for each; money or services." *Holloway I*, 572 A.2d at 693. The Petitioner's trial counsel may have made a strategic decision not to object to the lack of a limiting instruction because it could have made it more clear to the jury that the Petitioner's killing met the circumstances of (d)(2). Thus, the Petitioner's attorney did not provide deficient representation, and, additionally, there is no reasonable probability that the jury's decision would have been different if a limiting instruction had been provided to the jury. Accordingly, we dismiss Petitioner's ineffective counsel claim as being meritless.

b. Failure To Prove Section 9711 (d)(2) Beyond A Reasonable Doubt

On direct appeal, at his post conviction relief proceedings, and in his petition for a writ of habeas corpus, the Petitioner claimed that there was insufficient evidence to prove that he killed the victim or that the killing met the circumstances of (d)(2), and therefore the jury's decision to impose the death penalty violated his Fourteenth Amendment right to Due Process. (Pet. Mem. L. at 83.) We thus find this subclaim to have been fairly presented and exhausted. *See*

O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999); *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996). In *Holloway I*, the Pennsylvania Supreme Court ruled that the jury was presented with sufficient evidence to find that the circumstances of (d)(2) were fulfilled. The evidence presented to the jury at trial was gathered from testimony given by Shirley Baker and an unsigned statement made by Petitioner. On direct review of the trial jury's decision, the Pennsylvania Supreme Court concluded that the evidence was sufficient to establish that the Petitioner was "in the employ" of drug supplier "Bubbles" Johnson, and that Johnson instructed the Petitioner to kill the victim because the victim owed Johnson money and had "mess[ed] up a couple of [drug] packages." Therefore, the *Holloway I* court ruled that the evidence presented to the jury could allow for a determination that Petitioner worked for Johnson and that murder was "part of the job description." *Holloway I*, 572 A.2d at 693. This, according to the *Holloway I* court, fits the description of contract murder as set forth in § 9711(d)(2). The Pennsylvania Supreme Court declined to reconsider its decision in *Holloway II*. 739 A.2d at 1043-44. We review the decision of the Pennsylvania Supreme Court on direct appeal in accordance with the standards set forth in the AEDPA.

Petitioner argues that trial jury's conclusion that Petitioner met the circumstances of (d)(2) was arbitrary and capricious because "no reasonable sentencer could have so concluded." *Lewis v. Jeffers*, 497 U.S. 764, 783 (1990). Petitioner also argues that the evidence presented at trial could support other, alternative scenarios that would prove the Petitioner did not meet the circumstances of (d)(2), and the existence of alternative explanations means that the prosecution failed to prove (d)(2) beyond a reasonable doubt. *See United States v. Bright*, 550 F.2d 240, 242 (5th Cir. 1977); *United States v. Ramos*, 613 F. Supp. 115, 120

(S.D.N.Y. 1985); *United States v. Jones*, 605 F. Supp. 513, 516 (S.D.N.Y. 1984).

Reviewing the Pennsylvania Supreme Court's decision under the AEDPA standard, and considering Petitioner's arguments, we find that the Pennsylvania Supreme Court's decision as to the sufficiency of the evidence was not unreasonable. The evidence presented would allow a rational jury to find that an employer-employee relationship existed between Johnson and Petitioner, and that killing was a requirement of Petitioner's job description as Johnson's employee.

Furthermore, we must reject Petitioner's contention that the claim that he was under duress when he complied with Johnson's instruction to kill the victim provides reasonable doubt. Baker's testimony shows that Petitioner, under his own free will, made the statement, "I can take care of that now," meaning to kill the victim when Petitioner learned that the victim was in Johnson's van. This reflects that Petitioner did not object or resist Johnson's instructions. The jury merely found Baker to be more credible than Petitioner, as is its right. Therefore, we dismiss Petitioner's duress defense.

c. Retroactive Alteration Of The Proof Required For (d)(2)

In his PCRA brief and in his Petition, the Petitioner makes the claim that the Pennsylvania Supreme Court retroactively applied 42 Pa. Cons. Stat. § 9711(d)(14) to sustain the jury's decision to impose the death penalty, in violation of the Ex Post Facto Clauses, U.S. Const. art. I, § 10, cl. 1; art. I, § 9, cl. 3, and the Petitioner's right to Due Process. Petitioner builds this claim by stating that the Pennsylvania Supreme Court's decision in *Holloway I* failed to explain

how the Petitioner's killing could be considered a contract killing according to (d)(2), and that its decision seemed to be based on § 9711(d)(14), which was added by the Pennsylvania Legislature in 1989, three years after Petitioner's trial. Furthermore, the Petitioner claims that this Court must analyze this claim de novo because the Pennsylvania Supreme Court never answered his Ex Post Facto claim when it was presented at Petitioner's PCRA proceedings. Although the Petitioner is correct in claiming that the *Holloway II* court did not issue a decision regarding the Petitioner's Ex Post Facto claim, this Court finds the Petitioner's Ex Post Facto claim to be meritless. Therefore, under either a de novo standard of review or under the AEDPA standard of review, Petitioner's claim is denied.

As we have already concluded, there is sufficient evidence in the record to allow for a finding that the Petitioner killed the victim, and that the killing met aggravating circumstance (d)(2). Therefore, there is no basis for a finding that the Pennsylvania Supreme Court in *Holloway I* upheld the jury's death penalty decision based on aggravating circumstance (d)(14). The *Holloway I* opinion makes no mention of (d)(14), nor does its decision rely on or imply any reference to (d)(14). We find that the decision of *Holloway I* to uphold the jury's death penalty decision was based entirely on aggravating circumstances (d)(2) and (d)(8). Subsequently, the Ex Post Facto Clauses were not violated, nor was the Petitioner's right to Due Process. Thus, the Petitioner's claim is dismissed.

14. Claim XIV–Improper Jury Instructions As To Which Mitigating Circumstances Could Be Considered

Petitioner claims that the trial court's jury instructions as to which mitigating circumstances could be considered prohibited the jury from considering and giving full effect to some relevant mitigating evidence, therefore violating his Eighth and Fourteenth Amendment rights. He complains specifically of the instruction that "for the purposes of this case" the only possible mitigating circumstances were "The defendant has no significant history of prior criminal convictions," 42 Pa. Cons. Stat. § 9711(e)(1), and "Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense. *Id.* (e)(8). He argues that there was evidence presented that would have supported a finding of mitigating factors (e)(2),[155] (3),[156] and (5),[157] specifically evidence that Petitioner was under the influence of drugs and alcohol at the time of the offense, and that he acted under duress. He asserts that trial counsel was ineffective for failing to request a proper instruction, and for failing to argue such mitigating factors to the

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155 "The defendant was under the influence of extreme mental or emotional disturbance." 42 Pa. Cons. Stat. § 9711(e)(2).

156 "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." 42 Pa. Cons. Stat. § 9711(e)(3).

157 "The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa. Cons. Stat. § 309 (relating to duress), or acted under the substantial domination of another person." 42 Pa. Cons. Stat. § 9711 (e)(5).

jury, and also argues that direct appeal counsel was ineffective for failing to raise the claim directly and raise the claim of trial counsel's ineffectiveness.

On PCRA appeal, Petitioner raised this claim as one of trial counsel ineffectiveness for failing to request the jury instructions, and direct appeal counsel's ineffectiveness for failing to raise the claim of trial counsel's ineffectiveness. The Pennsylvania Supreme Court found that this claim had been previously litigated on direct appeal, apparently referring to its decision that trial counsel had not performed ineffectively with regard to mitigating circumstances.

In our decision as to Claim X, in Part III. 10. a., *supra*, we considered trial counsel's ineffectiveness for failing to request the assistance of a mental health expert and failing to investigate, develop, and present mitigating evidence that Petitioner suffers from cognitive defects; the effects of emotional, physical and sexual abuse as a child; and had an impaired capacity at the time of the offense as a result of chronic drug and alcohol abuse and acute intoxication. We found trial counsel's failure to present evidence on and argue (e)(2), (3) or (5) cannot be said to be unreasonable, because these mitigating circumstances contradict Petitioner's guilt-phase defenses of factual innocence and alibi, and counsel may, under the objectively reasonable standard we are required to apply, choose not to present such evidence because it may detract from other, uncontradicted, mitigating evidence. *See Flamer v. Delaware*, 69 F.3d 710, 734 (3d Cir. 1995) (defendant's claim of innocence may restrict penalty phase arguments counsel may make in mitigation); *accord Burger v. Kemp*, 483 U.S. 776, 793-94 (1987). Therefore, we find now that his failure to request jury instructions thereon, or to object to the jury instructions as given, cannot be said to be unreasonable, either. Counsel was not

ineffective, and therefore no relief is warranted on this claim.[158]

15. Claim XV–Ineffective Assistance Of State Court Counsel For Failing To Raise Or Properly Litigate Each Claim

In Claim XV, Petitioner makes a blanket assertion that his trial counsel was constitutionally ineffective for failing to either raise or properly litigate those issues presented in his previous twelve claims. Because we addressed Petitioner's ineffective assistance arguments with respect to Claims I-XIV individually, we refrain from repeating our analyses here. Petitioner's Claim XV is therefore denied in accordance with our foregoing conclusions.

16. Claim XVI–Cumulative Prejudicial Effect Of The Errors In This Case

In Claim XVI, Petitioner argues that he is entitled to habeas relief on the basis of the cumulative effects of the constitutional errors in his case. Because we have already identified a ground on which to grant Petitioner's resentencing, we find that such a collective consideration is unnecessary and would be inconsequential to our ultimate conclusion. Were we to do so we would not, in the absence

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[158] Even if we were to examine the Eighth and Fourteenth Amendment claim de novo, i.e. that the trial court's instruction prevented the jury from considering relevant mitigating evidence, we would find any error, if there were one, to be harmless because of our previous finding with regard to counsel's reasonable representation, and the need for trial counsel to request instructions and contemporaneously object to proposed instructions with which he disagrees.

of the ground upon which we are granting relief, find that the cumulative effect of the other grounds warranted relief.

IV. CONCLUSION

For the foregoing reasons, we vacate Petitioner's death sentence and remand to the Pennsylvania courts for the purpose of resentencing Petitioner. Petitioner presented sixteen claims for habeas corpus relief, most of which consisted of multiple subclaims and arguments. We find that two related issues both have merit and are properly before us; all other issues are either meritless, or the merits cannot be reached because of procedural defaults. In his Claim X. A., in Part III. C. 10. a. *supra*, Petitioner correctly argues that his trial counsel's representation was constitutionally ineffective, violating the Sixth Amendment, because he failed to reasonably investigate Petitioner's background for mental health related issues and because he failed to request that a mental health expert be appointed to assist the defense. These unreasonable deficiencies resulted in prejudice to Petitioner, because absent the errors, there is a reasonable probability that the jury would have given more weight to a mitigating circumstance or weighed the aggravating and mitigating circumstances differently and concluded that Petitioner should not receive a death sentence.

Petitioner was particularly concerned, as are we, that such a denial interfered with his ability to present evidence in support of mitigation at sentencing. The severity and permanence of the death penalty cautions us to consider very carefully the effect of any errors in Petitioner's legal process. Society's right to levy the ultimate penalty must be conditioned on a commitment to reliability in assigning that penalty. Therefore, due to the constitutional errors associated with the penalty phase of his state murder trial, we conclude

that the death penalty is improperly supported in Petitioner's case, and remand it to the state courts for resentencing at a new penalty phase proceeding.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARNOLD HOLLOWAY,	)	**CIVIL ACTION**
Petitioner,	)	
v.	)	
	)	
MARTIN HORN, Commissioner,	)	**NO. 00-CV-1757**
Pennsylvania Department of Corrections, and DONALD VAUGHN,	)	
Superintendent, State Correctional	)	
Institution at Graterford,	)	
Respondents.	)	**CAPITAL CASE**

FILED AUG 27, 2001

ORDER

And now, this 27th day of August, 2001, upon consideration of the Petition for Writ of Habeas Corpus, filed on April 3, 2000, all filings in this case, the entire record transmitted by the Clerk of Quarter Sessions Court of Philadelphia County, the expanded record, evidence presented at an evidentiary hearing, and oral arguments, it is hereby ORDERED, consistent with the foregoing opinion, that

1. Petitioner Arnold Holloway's Petition for Writ of Habeas Corpus is GRANTED as to Claim X. A., which relates to ineffectiveness of counsel for failure to investigate mental health related issues and request a defense mental health expert;

2. The Petition is DENIED in all other respects;

3. Petitioner's death sentence is hereby VACATED and his case REMANDED to the Pennsylvania courts for resentencing in a new penalty phase proceeding;

4. Based on our findings and conclusions in the foregoing Opinion, there are no grounds to issue a certificate of appealability, and such certificate is DENIED;

5. For the reasons stated in the foregoing Opinion, Petitioner's Motion for Summary Judgment on *Batson* Claim filed on August 2, 2001 is DENIED; and

6. As stated at the evidentiary hearing held August 16, 2001, the Commonwealth's Motion for Reconsideration of Grant of Evidentiary Hearing is DENIED.

BY THE COURT:

/s/_____
Franklin S. Van Antwerpen
United States District Judge

NO. 04-101

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Ph.D., Secretary, Pennsylvania DOC; DAVID DiGUGLIELMO, Superintendent, SCI-Graterford; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Petitioners,

v.

ARNOLD HOLLOWAY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. May a federal habeas court properly find a claim that was presented in a pro se brief exhausted, where state court practice at the time was to accept and consider such pro se briefs in capital cases, and where appellate counsel's unrebutted testimony was that the state supreme court decided at oral argument to accept and consider the pro se brief?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit)

2. May a federal habeas court applying *de novo* review grant Batson relief, where (a) the pattern of strikes and other relevant evidence established a *prima facie* case, and the Commonwealth conceded that the *prima facie* case exists; (b) the prosecutor volunteered explanations for three of his strikes but gave no reasons for the other eight; and (c) the court properly found that the reasons given for at least one of the strikes were a pretext for discriminatory intent?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit)

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COUNTERSTATEMENT OF THE CASE[1]

Five years after the murder of Richard Caldwell, heroin dealer Shirley Baker was arrested when she failed to appear for sentencing on several drug-related convictions. Baker told the police that Respondent and Danny Freeman had killed Caldwell at the instigation of Leroy Johnson. Baker testified against Freeman at his trial, but he was acquitted. Johnson was never charged.

After Freeman's acquittal, Respondent was arrested. The police claimed that Respondent confessed to them because he knew that Baker had already implicated him, despite the fact that Respondent knew Baker's testimony had been insufficient to convict Freeman. The police produced an unsigned typewritten statement, supposedly given to Detective Gilbert. Detective Gilbert claimed Respondent made the statement but then refused to sign it. Respondent denied giving a statement.

At the voir dire examination of prospective jurors, which occurred two weeks after this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986), the Commonwealth used twelve peremptory strikes, eleven of which were against African-Americans. Respondent "raised objections, created a record as to the race of the stricken venirepersons, and moved for a mistrial on the ground that a pattern of purposeful discrimination had been established." Holloway v. Horn, 355 F.3d 707, 712 (3d Cir. 2004), App. 9. In response to Respondent's objections, "the trial court invited a response from the prosecutor, asking, 'Does the Commonwealth have anything to say ...?'" App. 28 (quoting trial record). The prosecutor stated reasons for three of his strikes against African-Americans, but gave no reasons for the other eight. The trial court did not make any express ruling on the Batson challenge. Id.

At trial, there was a credibility contest between Respondent, who is African-American, and

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[1]The Petition for Writ of Certiorari is cited herein as "*Petition*." Petitioners are referred to as "the Commonwealth." The Appendix to the *Petition* is cited as "App." The parties filed an appendix in the Third Circuit, pursuant to that court's rules, which is cited herein as "A." All emphasis herein is supplied unless otherwise indicated.

Detective Gilbert, who is Caucasian, concerning the purported statement. Respondent denied making the statement, and presented an alibi defense. The trial court precluded Respondent from discussing or arguing that both he and the police officers were aware of Freeman's acquittal at the time Respondent purportedly confessed.

The jury convicted Respondent of first-degree murder and related charges. The jury sentenced him to death, concluding that the two aggravating circumstances it found outweighed the two mitigating circumstances it found. Post-trial motions, which included the Batson claim that was raised during jury selection, were denied. App. 29-30.

Respondent appealed to the Pennsylvania Supreme Court. Appellate counsel did not raise the Batson claim, but Respondent himself raised it in a pro se brief that was filed with and, the Third Circuit found, App. 15-22, accepted by the Pennsylvania Supreme Court. The Pennsylvania Supreme Court affirmed, without expressly ruling on the Batson claim. Commonwealth v. Holloway, 572 A.2d 687 (Pa. 1990) ("Holloway-1").

Respondent then filed a petition for state post-conviction relief ("PCRA petition"), again raising the Batson claim. The PCRA trial court denied relief; the Pennsylvania Supreme Court affirmed. Commonwealth v. Holloway, 739 A.2d 1039 (Pa. 1999) ("Holloway-2").

Respondent filed his first federal habeas petition. The District Court conducted a limited evidentiary hearing regarding the exhaustion/default status of the Batson claim. The District Court granted relief on Respondent's claim that counsel provided ineffective assistance at capital sentencing, but denied all guilt phase claims, including the Batson claim. Holloway v. Horn, 161 F. Supp. 2d 452 (E.D. Pa. 2001), App. 46.

A unanimous panel of the Third Circuit reversed, granting relief on the Batson claim. In reaching its ruling, the Third Circuit carefully reviewed a large number of issues relating to the exhaustion status of the claim; whether the claim was procedurally barred in any respect; on the

standard of review; and with respect to the merits of the claim.

On **exhaustion**, the Third Circuit ruled that the Batson claim was exhausted both on direct appeal and in state post-conviction ("PCRA") proceedings. App. 14-22 & n.5. The Batson challenge was raised during voir dire, App. 9, and in a post-verdict motion for a new trial, App. 29-30. Appellate counsel did not raise the Batson issue, but Respondent raised it by filing an application for permission to file a pro se appellate brief, together with a brief that raised the issue. The Pennsylvania Supreme Court deferred consideration of Respondent's request until oral argument. App. 15-16. At the District Court evidentiary hearing, appellate counsel's unrebutted testimony was that the Pennsylvania Supreme Court accepted the pro se claims at oral argument, including the Batson claim. App. 16-17.

Based on appellate counsel's testimony, as well as the "Pennsylvania Supreme Court's practice, at the time of Holloway's appeal, of considering issues raised pro se even if counseled briefs were filed," App. 18, the Third Circuit found that the Pennsylvania Supreme Court "assented to consideration of the pro se supplemental claims, including the Batson issue." App. 20. The Third Circuit further found that the Batson claim was raised and exhausted again in the PCRA proceedings, App. 22 n.5, and that Respondent's "decision to reassert the Batson claim on PCRA review does nothing to diminish his exhaustion of the claim on direct appeal." App. 21.

The Third Circuit further found that there was **no procedural default** of the Batson claim. The Commonwealth **does not seek *certiorari*** on the Third Circuit's conclusion that the Batson claim is not subject to any procedural default.

In the PCRA proceedings, the Pennsylvania Supreme Court ruled that the Batson claim was defaulted because it had not been raised in the PCRA trial court. Holloway-2, 739 A.2d at 1043-44. It proceeded to review the claim solely as a claim that PCRA counsel was ineffective for failing to raise the issue. Id. In fact, however, Respondent did raise the claim in the PCRA trial court, so there

was no default on that basis. App. 13; see also App. 108 n.30 ("An examination of the record, ... shows that the Batson claim was raised to the PCRA trial court").

The District Court ruled that Respondent defaulted the Batson claim because appellate counsel did not raise it on direct appeal. App. 107-08. As the Third Circuit found, however, the Pennsylvania Supreme Court "never expressly or otherwise held the [Batson] claim defaulted for that reason," App. 13, and therefore there was no bar to merits review of the claim. App. 13-14.

With respect to the **standard of review**, the Third Circuit ruled that its review of the Batson claim was *de novo*. The Commonwealth **does not seek *certiorari*** on the Third Circuit's decision to review the Batson claim *de novo*.

In order for the deferential standard of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") to apply, the claim at issue must have been "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). The Third Circuit found that, while Respondent presented the Batson claim to the Pennsylvania Supreme Court on direct appeal, that court "failed even to mention the claim (much less adjudicate the merits)"; thus, the pre-AEDPA *de novo* standard governed its review. App. 23. The Third Circuit further found that, on the PCRA appeal, the "Pennsylvania Supreme Court treated Holloway's Batson argument ... solely as a claim of ineffective assistance of counsel ...." Id. Because the state court did not address the underlying Batson claim, it did not "adjudicate[] the merits" of that claim in the PCRA proceedings. App. 23-24.

With respect to the **merits of the claim**, the Third Circuit had "little difficulty in concluding" that Respondent established a *prima facie* showing of discrimination. App. 30. The Third Circuit reached that conclusion based on the prosecutor's pattern of strikes – the prosecutor used seven of his first eight strikes, and eleven out of twelve in all, against African-Americans – and the fact that peremptory challenges permit those to discriminate who are of a mind to do so, see Batson, 476 U.S. at 96, which was particularly significant given that the trial involved a credibility contest between

an African-American defendant and a white police officer. App. 30-32.[2] The trial record regarding the prosecutor's pattern of strikes was so convincing that at oral argument in the Third Circuit, the **Commonwealth conceded** that the pattern of strikes establishes a *prima facie* case. Holloway v. Horn, Nos. 01-9009 & 01-9010, Transcript of Oral Argument at 48, 52 (3d Cir. Oct. 27, 2003).[3]

The prosecutor gave no reasons at all for eight of his strikes against African-Americans, despite being given the opportunity to do so by the trial court. The prosecutor stated on the record at trial reasons for three of his strikes. The Third Circuit was "troubled by the lack of race-neutrality" in those explanations, each of which explicitly referenced the potential juror's race, and "more troubled by the lack of any explanation at all for eight of his eleven strikes." App. 34. The court, however, assumed that the explanations proffered for three of the strikes would satisfy the second prong of Batson. It granted relief because the explanation given for striking venireperson John Hackley, Sr., "was plainly insupportable under Batson ...." Id.

The prosecutor's explanation for striking Mr. Hackley was that he was a "black male juror approximately the same age as the defendant." Given that the prosecutor accepted three white jurors of "approximately the same age as" Respondent, and chose not to exercise a strike against four other venirepersons of approximately the same age, the Third Circuit found that the reason given was a pretext for "discriminatory intent to remove Hackley because of his race." App. 34-35.

The Third Circuit rejected the Commonwealth's argument that it should consider other possible reasons not stated by the prosecutor at trial, because "where a prosecutor makes his

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[2]The court also noted that for those strikes for which the prosecutor volunteered explanations (including John Hackley, Sr., the potential juror with respect to whom the court found discrimination), the existence of a *prima facie* showing is moot. App. 33, citing Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion).

[3]Because the pattern of strikes was so convincing, the Third Circuit did not need to consider other evidence, developed during the federal habeas proceedings, concerning the race of the other venirepersons the prosecutor had an opportunity to strike. Had the court considered that evidence, however, it would have further supported the *prima facie* showing. App. 32 n.11.

explanation for a strike a matter of record, our review is focused solely upon the reasons given." App. 35-36. The court noted, however, that the record of Mr. Hackley's voir dire examination did not disclose any apparent non-discriminatory basis for the prosecutor's strike. App. 36.

Finally, the Third Circuit found that the Pennsylvania Supreme Court's decision on PCRA review did not bar relief on Respondent's Batson claim. On the PCRA appeal, the Pennsylvania Supreme Court stated that it could not even consider a claim that PCRA counsel was ineffective in failing to raise the Batson claim because Respondent had "failed to make a record 'identifying the race of venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the defense but stricken by the defense, and the racial composition of the final jury selected.'" Holloway-2, 739 A.2d at 1045, quoting Commonwealth v. Bronshtein, 691 A.2d 907, 915 (Pa. 1997).

The Third Circuit found that this "standard for assessing whether a defendant can make a *prima facie* showing of purposeful discrimination," App. 38, is "inconsistent with the teachings of Batson." App. 37. Under Batson, the "standard for assessing a *prima facie* showing is fluid." App. 41. While a full accounting of venireperson race "undoubtedly might ... be helpful" in some cases, "requiring the presentation of such a record" in every case "places an undue burden upon the defendant." App. 42. Here, the record was in fact sufficient to establish both a *prima facie* case of discrimination, as the Commonwealth conceded, and that the prosecutor's explanation for at least one of his strikes was pretextual. App. 44. Accordingly, applying *de novo* review, the Third Circuit found an equal protection violation.[4]

The Commonwealth requested rehearing *en banc*, raising substantially the same arguments as those presented in the *certiorari* petition. The Third Circuit denied rehearing *en banc*. App. 1-2.

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[4]Alternatively, the court would also have granted relief under AEDPA. App. 44-45.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

The Commonwealth asks this Court to grant its sparingly used *certiorari* review to address an exhaustion issue – whether Respondent's Batson claim was exhausted by his raising it in a supplemental *pro se* brief that he filed on direct appeal – and issues concerning the details of how that Batson claim was reviewed *de novo* by the Third Circuit. The Commonwealth's *certiorari* petition, however, fails to acknowledge the limited and alternative nature of the rulings it asks this Court to review.

The Third Circuit found: (1) Respondent's claim was exhausted both on direct appeal and in state post-conviction proceedings (the latter ruling is not challenged by the Commonwealth); (2) there was no adequate and independent bar to federal review (a ruling not challenged by the Commonwealth); (3) the claim should be reviewed *de novo* because it was not adjudicated on the merits by the state court (a ruling not challenged by the Commonwealth); and (4) applying *de novo* review, Respondent is entitled to relief on his Batson claim (a ruling that is not ultimately affected by the correctness *vel non* of the Third Circuit's discussion of errors it believed were committed by the state court). Because the Third Circuit ruled on several alternative grounds that are not challenged by the Commonwealth, review of the issues raised by the Commonwealth would not affect the Third Circuit's grant of relief. For that reason alone, *certiorari* review is not appropriate.

Moreover, the Commonwealth grievously distorts the actual rulings it asks this Court to review. The Third Circuit carefully parsed the procedurally, factually and legally complicated record of the Batson claim. It assessed numerous subsidiary issues of state law and procedure, and arrived at rulings that are clear, consistent with prior precedents (the Commonwealth does not assert the existence of any conflict in precedent as a basis for *certiorari* review) and correct. The Commonwealth attempts to obscure these facts both by distorting the holding and reasoning actually

applied by the Third Circuit, and by making a broadside attack on the entire Third Circuit – which denied *en banc* review of the issues raised here by the Commonwealth – and the panel below as a biased group of anti-death penalty zealots who, in capital cases, abandon their oaths to decide cases impartially. See *Petition* at 17-18 n.7. The Commonwealth's vitriol and hyperbole are misplaced and offensive; the Third Circuit's actual decision is balanced, fair and correct.

II. THIS COURT SHOULD NOT REVIEW THE THIRD CIRCUIT'S ALTERNATIVE AND CORRECT HOLDING THAT THE BATSON CLAIM WAS EXHAUSTED ON DIRECT APPEAL.

A. The Third Circuit's Exhaustion-on-Direct-Appeal Ruling Was an Alternative Holding That this Court Should not Review.

The Third Circuit ruled that Respondent "satisfied the exhaustion requirement on direct appeal." App. 14. The Third Circuit alternatively found that Respondent "also exhausted the Batson claim on PCRA review." App. 22 n.5. Furthermore, the Third Circuit found that there was no adequate and independent state court bar, arising either on direct appeal or in the PCRA proceedings, to federal habeas review. App. 13-14. Finally, the Third Circuit found that the state courts did not adjudicate the merits of the Batson claim, either on direct appeal or in the PCRA proceedings, and therefore that its review was *de novo*. App. 23-24.

Of those four rulings, the Commonwealth challenges only the first. Even were this Court to grant review and reverse the Third Circuit's first ruling, however (which it should not do for the reasons set forth in part B, infra), that would not affect the Third Circuit's other holdings that the claim was exhausted in the PCRA proceedings, and is not subject to any procedural bar. Thus, review and even reversal of the exhaustion-on-direct-appeal ruling would not affect the outcome of the case. Accordingly, it is not an appropriate issue for *certiorari* review.[5]

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[5]The Commonwealth says in a footnote that the exhaustion-on-direct-appeal ruling was critical "because if the Batson claim was *not* exhausted on direct appeal, the most Holloway could logically be entitled to is review of his *ineffectiveness* claim." *Petition* at 22 n.9 (emphasis original).

B. The Third Circuit's Finding That the Batson Claim Was Exhausted on Direct Appeal Raises No Important Federal Question.

The Third Circuit correctly found that this claim was exhausted on direct appeal, and not subject to any adequate procedural bar by the state court, when Respondent presented it to the Pennsylvania Supreme Court in his pro se brief. App. 14-22.[6] The Third Circuit's exhaustion finding was based on several considerations, none of which is undermined by the Commonwealth.

First, the Third Circuit held that its exhaustion-on-direct-appeal finding was compelled by the state court record and the record made in the District Court, which held an evidentiary hearing on the exhaustion/default status of the Batson claim.[7]

The Pennsylvania Supreme Court's docket shows that Respondent filed his pro se brief, containing the Batson claim, along with an application for permission to file it as a supplement to the counseled brief. App. 15. The Pennsylvania Supreme Court's docket also shows that, at the time of the filing, the "Pennsylvania Supreme Court entered an order deferring consideration of Holloway's application to file the pro se supplemental brief until the time of oral argument on the

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But that would only be true if the Batson claim that was presented in the PCRA proceedings was subject to an adequate and independent procedural bar, so that Respondent was required to raise an ineffectiveness claim to overcome the bar. The Third Circuit, however, ruled that there was no adequate and independent bar, and that the Pennsylvania Supreme Court never adjudicated the merits of the underlying Batson claim, either on direct appeal or post-conviction – rulings that the Commonwealth has not challenged. Accordingly, even a reversal of the exhaustion-on-direct-appeal ruling would not affect the Third Circuit's conclusions that the claim was exhausted, was not barred, and was subject to *de novo* review.

[6]The Commonwealth does not dispute that the content of the pro se brief was sufficient to exhaust the claim; it plainly was, as the Third Circuit found. App. 14-15. The Commonwealth's sole argument is that presentation of a claim in a pro se brief was insufficient to exhaust.

[7]The District Court hearing was limited to questions of exhaustion/default; it did not address the merits of the underlying Batson claim. Therefore, 28 U.S.C. "§ 2254(e)(2) is inapplicable to [the] hearing" and "the evidence adduced at the hearing is properly considered for purposes of the exhaustion analysis." App. 18. The Commonwealth does not seek *certiorari* regarding the propriety of the hearing.

appeal." App. 15-16. The docket, however, is silent as to the Pennsylvania Supreme Court's ultimate disposition of Respondent's pro se motion and claims. App. 16.

The District Court "held a limited evidentiary hearing" on the exhaustion/default status of the Batson claim. App. 16. The sole witness at the hearing was direct appeal counsel, Robert Redmond. Mr. Redmond testified that, during the direct appeal oral argument, the Pennsylvania Supreme Court explicitly ruled that it would consider the issues raised in the pro se brief – i.e., it orally granted Respondent's pro se motion to allow that brief as a supplement to the counseled brief. App. 16-17.[8] Mr. Redmond's testimony was unrebutted: "The Commonwealth ... presented no evidence at the federal hearing to rebut or cast any doubt upon [Redmond's] recollection that the state court accepted the pro se supplemental brief for consideration." App. 17.[9]

Based on this unrebutted evidence, the Third Circuit concluded: "On this record, Holloway has met his burden of showing that he exhausted the Batson claim on direct appeal, as he placed the state court on notice of the factual and legal substance of his federal equal protection argument and raised the claim through the established system for review." App. 17.

Second, the Third Circuit explained that its "conclusion that Holloway exhausted the Batson

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[8]Mr. Redmond's unrebutted testimony included the following: A625-26 (At oral argument, "the [Pennsylvania Supreme] Court said it would consider all the matters contained in the pleadings set forth and the Batson issue was one of them."); A626 (pro se brief "was part of the docket entries that had been ... duly filed and timely filed and it was set forth and it was for a part of the Court's consideration. And the Court even noted the fact that it would consider that Batson issue or at least his pro se brief."); A642 (Pennsylvania Supreme "Court had duly noted that it had received the pro se brief, was taking it under advisement, taking all the matters raised under advisement after oral argument. So I thought that the Court had taken note of it."); A642 "Q. ... So there had been the raising of the issue in the pro se filing ... and then at oral argument your recollection is that the Court said it would take all issues under advisement ...? A. Yes.").

[9]As the Commonwealth notes, oral arguments before the Pennsylvania Supreme Court are not transcribed. *Petition* at 25. Thus, evidence about what occurred at the argument could come only from a participant, such as Mr. Redmond. The Commonwealth was free to call anyone from the District Attorney's Office who participated in the oral argument, but did not call anyone or present or proffer any evidence contrary to Mr. Redmond's testimony.

claim by means of his pro se brief is fully supported by the Pennsylvania Supreme Court's [capital case] practice, at the time of Holloway's [direct] appeal, of considering issues raised pro se even if counseled briefs were filed." App. 18. The Third Circuit is correct. As the Third Circuit found, App. 18-20, the Pennsylvania Supreme Court's practice of accepting pro se briefs from counseled appellants in capital cases is shown by Pennsylvania Supreme Court decisions from the relevant time, which repeatedly note that the Court had accepted such briefs and which never decline to accept them.[10] The Pennsylvania Supreme Court did not change this practice until 1994, four years after Respondent's direct appeal. App. 19-20 (discussing Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993) (non-capital case); Commonwealth v. Reid, 642 A.2d 453 (Pa. 1994) (the first capital decision that declined to accept pro se claims)). The Pennsylvania Supreme Court's pre-1994 practice of accepting pro se briefs in capital cases was also confirmed at the District Court hearing, where direct appeal counsel testified, without contradiction or rebuttal, that this was the Pennsylvania Supreme Court's practice at the time of Respondent's direct appeal.[11]

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[10]Commonwealth v. Maxwell, 477 A.2d 1309, 1312 & n.2 (Pa. 1984) (addressing on merits claims raised by appellant in "pro se letters addressed to this Court"); Commonwealth v. Maxwell, 626 A.2d 499, 501 (Pa. 1993) (same); Commonwealth v. Billa, 555 A.2d 835, 842 (Pa. 1989) (addressing claims raised in a "Pro Se Supplemental Brief," filed after oral argument, under Rule of Appellate Procedure 2501(a)); Commonwealth v. Tedford, 567 A.2d 610, 626 (Pa. 1989) (reviewing all claims raised in both pro se and counseled briefs); Commonwealth v. Tilley, 595 A.2d 575, 579 & n.9 (Pa. 1991) (same); Commonwealth v. Ly, 599 A.2d 613, 617-18 (Pa. 1991) (same); Commonwealth v. Chambers, 599 A.2d 630, 633, 642 n.7 (Pa. 1991) (same); Commonwealth v. Jones, 610 A.2d 931, 948 n.3 (1992) (same); Commonwealth v. Zook, 615 A.2d 1, 22 (Pa. 1992) (same); Commonwealth v. Williams, 615 A.2d 716, 720 & n.6 (Pa. 1992) (same). Two of these opinions, Billa and Zook, note that the pro se brief was filed after oral argument.

[11]E.g., A610 ("at the time of this appeal, Pennsylvania law permitted a petitioner to make a pro se submission of issues to the Pennsylvania Supreme Court"); A611 ("at the time ... a capital defendant could submit issues pro se to the Pennsylvania Supreme Court and ... the Pennsylvania Supreme Court would rule on them"); A627 ("at the time the Pennsylvania Supreme Court considered pro se briefs by ... capital defendants"); A624 (the pro se brief was a "legitimate" way of putting the Batson claim "before the [Pennsylvania Supreme] Court and [Respondent] had done a fine job of raising it"); A625 (Batson issue "was preserved throughout" trial and direct appeal

Given direct appeal counsel's unrebutted testimony that the Pennsylvania Supreme Court did accept the pro se brief; given the pre-1994 caselaw showing that it was the Pennsylvania Supreme Court's "practice at the time" to accept such pro se briefs; and given appellate counsel's unrebutted testimony confirming that this was the Pennsylvania Supreme Court's practice at the time, the Third Circuit "simply ha[d] no reason to believe that the [Pennsylvania Supreme] Court refused" to accept the pro se brief in this case. App. 20.

Finally, the Third Circuit noted that its exhaustion-on-direct-appeal holding is consistent with Third Circuit precedent, Buehl v. Vaughn, 166 F.3d 163, 176 n.8 (3d Cir. 1999), which had also held, in a Pennsylvania capital case, that a "counseled petitioner exhausted claims by presenting them in a pro se brief to the Pennsylvania Supreme Court." App. 17.[12] For all of these reasons, the Batson claim was exhausted on direct appeal.

The Commonwealth misstates the Third Circuit's exhaustion holding, claiming the Third Circuit "held that the Pennsylvania Supreme Court was *obligated* to accept" the pro se brief. *Petition* at 25 (emphasis original). But the Third Circuit never even suggested that the Pennsylvania Supreme Court was "obligated to accept" the pro se brief. Instead, the Third Circuit found, based

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proceedings by trial counsel's actions at trial and in post-trial motions and by Respondent's pro se filings on appeal); A627 (Batson "issue was before the [Pennsylvania] Supreme Court" through the pro se filing); A631 (Respondent "himself had raised the issue [in the pro se brief] ... so it was preserved on the record as far as I was concerned. Whether I raised it or not, it was preserved by the appellant himself."); A638 (because of the pro se brief, "the issue was there [before the Pennsylvania Supreme Court] and I felt that [Respondent] was in better command of the knowledge of what was going on in jury selection than I was"); A639 ("this [Batson] issue that was raised, I felt that it had merit, especially coming from [Respondent] because [Respondent] was there at the trial and he knew much better than I knew what had taken place at the trial"); A644 ("The [Batson] issue was preserved on post-trial motions and at trial it was preserved and it was preserved on appellate review by [Respondent] himself" through the pro se submission); A648 (pro se presentation was "sufficiently raising it to the Pennsylvania Supreme Court").

[12] As here, the Pennsylvania Supreme Court's Buehl opinions do not mention the pro se brief or these pro se issues. See Commonwealth v. Buehl, 508 A.2d 1167 (Pa. 1986); Commonwealth v. Buehl, 658 A.2d 771 (Pa. 1995).

on the unrebutted evidence, that the Pennsylvania Supreme Court did accept the pro se brief, and that its acceptance of the pro se brief was consistent with its pre-1994 capital case precedent, under which it repeatedly accepted such pro se briefs and never said such pro se briefs would not be accepted.

The Commonwealth also distorts the content of direct appeal counsel's testimony, claiming he testified only that the Pennsylvania Supreme Court "received" the pro se brief, but did not testify that the Court "accepted" it. *Petition* at 24, 28-29. Assuming for the sake of argument a material difference between "receiving" and "accepting," the Commonwealth's argument is contrary to the record and contrary to the Third Circuit's factual findings, based on that record, that the state court accepted the brief and agreed to consider the claims therein. See supra. The Commonwealth's argument, which asks this Court to second guess the Third Circuit on a factual issue, highlights how inappropriate it would be to grant *certiorari*. See Supreme Court Rule 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings").

Apparently recognizing that direct appeal counsel's actual testimony is fatal to its argument, the Commonwealth asks this Court to disbelieve that testimony. *Petition* at 22-23, 29 n.11. Again, this desperate argument shows that *certiorari* review is inappropriate. See Supreme Court Rule 10. Moreover, there actually is no reason to disbelieve appellate counsel's testimony.

The Commonwealth says direct appeal counsel should be disbelieved because the state court docket "mentions no 'acceptance' of the pro se brief." *Petition* at 29 n.11. This is absurd. The state court docket does not say one way or the other whether the pro se brief was "accepted" – it is silent on that issue. The only evidence on that issue is appellate counsel's unrebutted testimony that the court did accept the brief at the oral argument. The Commonwealth says appellate counsel should be disbelieved about the state court's acceptance of the brief because other parts of his testimony supposedly were "false." *Petition* at 29 n.11. While such a credibility argument is unworthy of *certiorari* in any event, the Commonwealth's assertions are baseless.

The Commonwealth says counsel testified "false[ly]" when he said the pro se brief was "timely." *Petition* at 29 n.11. But it was timely – Rules of Appellate Procedure 123 and 2501, under which it was filed, do not contain time limits. The Commonwealth says counsel "testified that he *relied* on the contents of [the pro se] brief while writing his own" brief; according to the Commonwealth this is "false" because the pro se brief was filed after the counseled brief. *Petition* at 29 n.11 (emphasis original). But counsel's testimony was that he discussed the Batson issue with Respondent before he drafted the counseled brief; he therefore knew before he drafted the counseled brief that Respondent intended to raise the issue pro se; and he believed that the pro se brief properly raised it. A622-24. The Commonwealth says counsel "did not mention the pro se brief" when he spoke to the prosecutor several days before the District Court hearing and "conceded that he had not remembered the pro se brief until Holloway's current counsel brought it to his attention." *Petition* at 29 n.11. But this is entirely unremarkable and suggests honesty, not fabrication. Counsel testified that the prosecutor had not shown him any documents from the original proceedings (e.g., docket sheets, pro se brief, counseled brief, post-verdict motions, jury selection transcripts, etc.). A643. It is not surprising that counsel did not recall the details of what happened until after his memory was refreshed by examination of the documents.

The Commonwealth disagrees with the Third Circuit's finding that it was the Pennsylvania Supreme Court's pre-1994 practice to accept pro se briefs from counseled appellants in capital cases. See *Petition* at 22-23, 25-26. This argument over the details of state law and practice is not worthy of *certiorari*. Rather, this Court routinely defers to Court of Appeals decisions about such matters.[13]

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[13]See, e.g., Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (declining to address exhaustion/procedural bar issue because, "as we have repeatedly recognized, the courts of appeals are more familiar than we with the procedural practices of the States in which they regularly sit"); Cranberry v. Greer, 481 U.S. 129, 136 n. 9 (1987) ("Petitioner has also contested the Court of Appeals' determination that he failed to exhaust his state remedies. ... On that issue, however, we defer to the Court of Appeals which is more familiar with Illinois' practice than we are."); Rummel v. Estelle, 445 U.S. 263, 267, n.7 (1980) (rejecting procedural default argument on the basis of

Moreover, the Commonwealth is plainly wrong. The Third Circuit cited numerous pre-1994 capital cases in which the Pennsylvania Supreme Court did accept such pro se briefs, App. 18-20; see n. 10, supra; the Commonwealth has never identified even one pre-1994 capital case where the Pennsylvania Supreme Court declined to accept such pro se briefs. Instead, the Commonwealth relies on non-capital cases from Pennsylvania's Superior Court which, as the Third Circuit found, do not reflect the Pennsylvania Supreme Court's capital case practice. See App. 19-20 (discussing the Commonwealth's Superior Court caselaw).[14]

The Commonwealth says the Third Circuit's exhaustion holding is inconsistent with another Third Circuit decision, Sweger v. Chesney, 294 F.3d 506 (3d Cir. 2002), which supposedly "held that claims raised by [counseled] criminal defendants are *not exhausted* by inclusion in pro se appellate briefs." *Petition* at 23 (emphasis original). Even if this were true, such an intra-Circuit conflict is not grounds for granting *certiorari*.[15] Tellingly, the Commonwealth does not even suggest an inter-Circuit conflict. In fact, the other Circuits are in accord with the Third Circuit – while this issue rarely arises, in the few cases in which it has, the Courts of Appeal have found the pro se

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deference to the Court of Appeals' interpretation of Texas contemporaneous-objection law); County Court of Ulster Cty. v. Allen, 442 U.S. 140, 153-54 (1979) (declining to find procedural bar where "three Second Circuit Judges, whose experience with New York practice is entitled to respect, concluded that the State's highest court had decided the issue on its merits"); Butner v. United States, 440 U.S. 48, 57-58 (1979) (lower courts better suited to decide questions of state law).

[14]The Commonwealth cites one Pennsylvania Supreme Court case that pre-dates Respondent's direct appeal, Commonwealth v. Colson, 490 A.2d 811 (Pa. 1985). See *Petition* at 23. Colson, however, is a non-capital case holding there is no constitutional right to act as co-counsel at trial. Colson says nothing about whether the Pennsylvania Supreme Court would accept pro se appellate briefs; the Court routinely accepted them in capital cases.

[15]An intra-Circuit split would be grounds for *en banc* Circuit rehearing. The Commonwealth sought *en banc* rehearing because the panel decision supposedly "is in tension with Sweger." *Petition for Rehearing En Banc* at 12. The *en banc* Circuit was unimpressed and denied rehearing.

claims to be exhausted.[16]

Moreover, there is no conflict even within the Third Circuit. Sweger is consistent with the Third Circuit's ruling here (and its earlier decision in Buehl, supra, which also found pro se claims exhausted). The Commonwealth's description of Sweger – that it supposedly held pro se claims unexhausted – is not what Sweger actually held. Instead, Sweger actually held that the pro se claim was "exhausted but procedurally defaulted because the [state courts] ... dismissed it on procedural grounds." Id., 294 F.3d at 522. Thus, Sweger, like the panel here, held that claims were exhausted in a pro se brief.[17] There is no inconsistency even within the Third Circuit.

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[16]See, e.g., Clemmons v. Delo, 124 F.3d 944, 947-49, 954 (8th Cir. 1997) (claims exhausted where counseled appellant presented them to state supreme court in a pro se "motion ... for leave to file a supplemental brief pro se" and state supreme court "denied the pro se motion without comment"); Dorsey v. Kelly, 112 F.3d 50, 52 (2d Cir. 1997) ("A petitioner may satisfy the exhaustion requirement by presenting his federal claim in a pro se supplemental brief, even if he has an attorney"; finding such claims exhausted); Reid v. Senkowski, 961 F.2d 374, 376 (2d Cir. 1992) (same); Abdurrahman v. Henderson, 897 F.2d 71, 72-74 (2d Cir. 1990) (same); Atkins v. Moore, 139 F.3d 887, 1998 WL 93409, *4 n.6 (4th Cir. March 5, 1998) (unpublished, text on Westlaw) (same); Grizzell v. Compton, 918 F.2d 178, 1990 WL 177374, *1 (6th Cir. Nov. 13, 1990) (unpublished, text on Westlaw) (claims exhausted where counseled appellant "submitted a supplemental pro se brief addressing additional issues" to the state court, and state court "never considered the issues presented in the [pro se] supplemental brief"); Southers v. Morgan, 925 F.2d 1465, 1991 WL 21972, *1-*2 (6th Cir. Feb. 21, 1991) (unpublished, text on Westlaw) (claims exhausted where counseled appellant presented them to state court in a "supplemental pro se brief" and state court granted state's motion "to strike [the] pro se pleadings").

[17]The Third Circuit found that there is no procedural bar here, App. 12-14, and the Commonwealth **does not seek *certiorari*** on that ruling. Moreover, the Third Circuit's ruling is correct, for several reasons. First, the Holloway state court did not deny the pro se brief on procedural grounds; instead, direct appeal counsel's unrebutted testimony is that the state court accepted the brief. Second, even if direct appeal counsel's testimony is ignored, what is left is a silent record that does not state a denial on any grounds, let alone on procedural grounds. Under these circumstances, it is impossible to say that the state court "actually ... relied on the [supposed] procedural bar" as an "independent basis for [its] decision," and there is no bar against federal merits review. Harris v. Reed, 489 U.S. 255, 261-62 (1989). Third, even if it is assumed, contrary to the record, that the state court actually denied the Batson claim on procedural grounds (because it was raised pro se), such a denial would not be an adequate state ground because there was no "firmly established and regularly followed state practice" of barring such pro se claims; instead, the practice

Finally, the Commonwealth repeatedly emphasizes that the Pennsylvania Supreme Court did not mention the Batson claim in its direct appeal opinion. But that is quite irrelevant to the exhaustion issue. As the Third Circuit explained:

> It is "too obvious to merit extended discussion that whether the exhaustion requirement ... has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." Smith v. Digmon, 434 U.S. 332, 333 (1978) (per curiam) ....

App. 21.[18]

The Third Circuit's exhaustion-on-direct-appeal finding is an alternative ruling and is clearly correct. Moreover, the Commonwealth has utterly failed to show that it involves an important question of federal law. This Court should not grant *certiorari* to review such a trivial matter.

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at the time, see note 10, supra, was to allow such pro se claims. See Ford v. Georgia, 498 U.S. 411, 423-24 (1991) (later-adopted state procedural bar not adequate); see also Clemmons, 124 F.3d at 948 & n.3, 954 (no adequate bar to claims raised in pro se brief, though state court denied motion for leave to file brief; because state court sometimes allowed pro se briefs, there was no "regularly applied rule of state procedural law" barring them).

[18] Accord Buehl, supra (claims exhausted where petitioner presented them in pro se brief and Pennsylvania Supreme Court denied relief without mentioning pro se brief or claims); Clemmons, 124 F.3d at 948 & n.3, 954 (claims exhausted where petitioner presented them to state court in pro se supplemental brief, which the state court denied leave to file); Atkins, 1998 WL 93409 at *4 n.6 (claims exhausted where petitioner presented them to state court in pro se supplemental petition and state court "did not rule explicitly on the supplemental petition"); Grizzell, 1990 WL 177374 at *1 (same); Southers, 1991 WL 21972 at *1-*2 (claims exhausted where presented in "supplemental pro se brief" and state court granted state's motion "to strike [the] pro se pleadings").

III. THIS COURT SHOULD NOT GRANT *CERTIORARI* TO REVIEW LOWER COURT *DICTA*; THE THIRD CIRCUIT CORRECTLY APPLIED BATSON IN ITS *DE NOVO* REVIEW OF RESPONDENT'S CLAIM.

A. This Court Should not Grant *Certiorari* to Review the Third Circuit's Discussion, in *Dicta*, of the State Court's Ruling.

The Third Circuit reviewed the Batson claim *de novo* because it was not "adjudicated on the merits," § 2254(d), in the state court. See Counterstatement of the Case. The Commonwealth does not seek *certiorari* on the Third Circuit's ruling that the claim was subject to *de novo* review.

Applying *de novo* review, the Third Circuit found that Respondent established a *prima facie* case of discrimination; ruled in the alternative that no *prima facie* showing was needed with respect to prospective jurors for whom the prosecutor volunteered reasons for his strikes; assumed that the prosecutor had proffered facially race-neutral explanations for three of his strikes of African-Americans; found that the proffered explanation for the strike of John Hackley, Sr., was a pretext for a "discriminatory intent to remove Hackley because of his race"; and granted relief. App. 35.

After granting relief on the Batson claim, the Third Circuit discussed the Pennsylvania Supreme Court's ruling in Holloway-2 on a claim that prior counsel was ineffective for failing to raise the Batson issue. App. 37-44. The Commonwealth urges this Court to grant *certiorari* and review the correctness of that discussion. *Petition* at 7-22.

The correctness of the Third Circuit's discussion of Holloway-2, however, is not essential to its judgment. Given that the Third Circuit was applying *de novo* review, in discussing the state court ruling it was simply heeding this Court's admonishment that federal habeas courts applying such review "should, of course, give great weight to the considered conclusions of a coequal state judiciary." Miller v. Fenton, 474 U.S. 104, 112 (1985). Just as plainly, however, that discussion was *dicta* – once the Third Circuit had decided that the prosecutor had stricken prospective juror Hackley because of his race, the correctness *vel non* of the state court ruling was not controlling. See id. (the "ultimate question [of constitutionality] is a matter for independent federal determination").

The Third Circuit's discussion of Holloway-2 is *dicta* for another reason as well. While the Third Circuit found a *prima facie* case, App. 32-33, it also ruled that the *prima facie* showing is not necessary "when the prosecutor provides explanations for his strikes despite the absence of a request from the trial court," App. 33, citing Johnson v. Love, 40 F.3d 658, 663-65 (3d Cir. 1994); Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion), a ruling the Commonwealth does not challenge. The prosecutor volunteered reasons for striking Mr. Hackley; the Third Circuit found those reasons to be pretextual; and the Third Circuit granted relief on that basis. App. 34-36. Thus, nothing the Third Circuit said about Holloway-2, which concerned only the *prima facie* case, affects the Third Circuit's decision to grant relief.

The Commonwealth urges this Court to review the Third Circuit's finding of a *prima facie* case (even though the Commonwealth conceded at oral argument that such a case could be found). But the Third Circuit made the alternative ruling that a *prima facie* showing was not necessary. This Court should not grant *certiorari* to review the correctness of the Third Circuit's *dicta*.

B. Applying *De Novo* Review, the Third Circuit Correctly Found that Respondent Established a Violation of Batson.

Jury selection in this case took place just two weeks after this Court decided Batson. App. 25 n.7. During jury selection, Respondent, "an African-American, raised objections, created a record as to the race of the stricken venirepersons, and moved for a mistrial on the ground that a pattern of purposeful discrimination had been established. The prosecutor responded by explaining his reasons for three of the strikes," against African-Americans but failed to give any reasons for eight of his strikes against African-Americans. App. 9.

The Third Circuit carefully reviewed the record Respondent made in state court and found a *prima facie* case under Batson. App. 30-37. The existence of a *prima facie* case is quite clear. Indeed, at the Third Circuit oral argument the **Commonwealth conceded the existence of a *prima facie* case**. See infra.

The Third Circuit cogently summarized relevant parts of the record:

> Holloway first objected to the prosecutor's peremptory strikes on the second day of the voir dire proceedings .... After several additional potential jurors were struck by agreement or for cause, Holloway's counsel formally asserted his objection, stating, "I think the District Attorney has now developed a pattern of striking only black prospective jurors. I think that pattern has now developed, and there are nine jurors selected, and two black jurors out of that particular nine. And I would ask for a mistrial and [to] start all over again." [A]1367-68.
>
> Without indicating whether it thought Holloway established a prima facie case, the trial court invited a response from the prosecutor, asking, "Does the Commonwealth have anything to say at this time?" Id. at 1368. The prosecutor replied, "Sure, Judge. As [defense counsel] has indicated, number one, we have nine seated in the box, two of them [sic] whom are black. One black male and one black female. [Counsel] is incorrect when he tells the Court that I have used my pre-empts exclusively on blacks, that's not true. I've struck a white woman also." Id. ... [T]he trial court ended the matter without expressly ruling on whether the prosecutor had struck African-Americans because of their race. The judge concluded, "[Holloway] also knocked off a potential black juror, but the record will speak for itself." Id. at 1369. At that point in the proceedings, the record was clear that the prosecutor had used seven of eight peremptory strikes against African-Americans.[19]
>
> The prosecutor subsequently exercised four additional peremptory strikes, all against African-Americans. After the first of those strikes, against Starlett Sandoval, Holloway's counsel noted for the record that "the Commonwealth has struck another black juror." Id. at 1376. The prosecutor offered no explanation for the strike, nor did the court request one. The prosecutor later struck Robert Keel, after which defense counsel noted, "Let the record indicate a black male." Id. at 1397. Without prompting from the trial court, the prosecutor elected to explain the strike, stating, "May the record indicate a single, young, unemployed, on welfare, black male." Id. The prosecutor next used a peremptory strike against John Hackley, Sr., and Holloway again noted the venireperson's race. [A]1488. The prosecutor explained, "Let the record further show that it is a black juror, black male juror approximately

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[19]The Commonwealth claims that, at this point in the proceedings, "the trial record reflects only the race of the nine jurors already selected ... and it does not establish the racial composition of the other venirepersons." *Petition* at 4. The Commonwealth is quite wrong. As both the Third Circuit and the District Court found, the voir dire record shows that the prosecutor, at this time, had struck seven African-Americans and one white. App. 28, 105. Moreover, the voir dire record also shows that "the race of prospective jurors acceptable to the Commonwealth but stricken by the defense," Holloway-2 at 1045, was zero African Americans and eight whites; and that "the racial composition of the ... jury selected," id., was two African-Americans and seven whites. App. 105.

the same age as the defendant." Id. Finally, the prosecutor exercised a peremptory strike against Elouise Baldi, and after Holloway made note of her race, the prosecutor explained that she was "a Black female, whose brother-in-law was convicted of narcotics charges. Narcotics would play a central role in the testimony of this case." Id. at 1493-94.

The matter proceeded to trial with a jury of nine white jurors and three black jurors, with two white alternate jurors.

App. 27-29 (footnotes omitted).

Thus, the record shows, inter alia: the prosecutor used **eleven** of his **twelve** peremptory strikes against African-Americans; the trial court gave the prosecutor am opportunity to provide reasons for striking these eleven African-Americans; the prosecutor gave **no reason at all** for eight of his strikes against African-Americans; he gave the above-quoted reasons for striking three African-Americans (Mr. Keel, Mr. Hackley, Ms. Baldi).

Based on this, and other relevant record facts, the Third Circuit found a *prima facie* case, App 7, 30-37, and the Commonwealth conceded that a *prima facie* case exists.

The Third Circuit first considered the prosecutor's racially disparate "pattern" of strikes:

> The most striking factor in this case is the prosecutor's pattern of strikes. Holloway moved for a mistrial after the prosecutor had used seven of eight peremptory strikes against African-Americans; the Commonwealth ultimately used eleven of twelve strikes in that manner. As the Court explained in Batson, "a 'pattern' of strikes against black jurors in the particular venire might give rise to an inference of discrimination." 476 U.S. at 97. The pattern here was certainly strong enough to suggest an intention of keeping blacks off the jury.

App. 30.[20]

At the Third Circuit oral argument, the Commonwealth's counsel, Mr. Dolgenos (who also represents the Commonwealth in this Court), **conceded that the racial disparity in the**

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[20]The Third Circuit cited Harrison v. Ryan, 909 F.2d 84 (3d Cir. 1990), which found a *prima facie* case where a Philadelphia prosecutor used six of eight peremptory strikes against African-Americans. App. 30-31. Many similar cases can be cited. Given the Commonwealth's concession that a *prima facie* case exists, we do not belabor this.

prosecutor's strikes, standing alone, establishes a *prima facie* case:

> THE COURT: Eleven out of 12. That's a pretty big percentage, isn't it?
>
> MR. DOLGENOS: Yes.
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> THE COURT: ... [H]ow does 11 of 12 not give you a prima facie case? Forget all this business about Neeley and Hackley and one person's a young black male, same age as the defendant but you've got white males same age as the defendant sitting on the jury. How does 11 of 12 possibly not equal prima facie case?
>
> MR. DOLGENOS: Well, I agree with Your Honor, the court could easily have found a prima facie case .... **I'm not defending the prima facie case question**.
>
> * * *
>
> THE COURT: **Eleven of 12 equals a prima facie case**.
>
> MR. DOLGENOS: **Right** ....

Holloway v. Horn, Nos. 01-9009 & 01-9010, transcript of oral arg. at 48, 52 (3d Cir. Oct. 27, 2003).

Moreover, as the Third Circuit found, there are also "other relevant circumstances" that "raise an inference" of discrimination, and Respondent "is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." App. 31 (quoting Batson, 476 U.S. at 96). For example, the prosecutor did not give any reasons for eight of his strikes against African-Americans when the trial court gave him the opportunity to do so. Instead:

> In responding to Holloway's motion for a mistrial, the prosecutor ... explained that he had not used his "pre-empts exclusively on blacks" because he had "struck a white woman also." [A]1368. This explanation, however, did nothing to dispel Holloway's suggestion that the prosecutor harbored a discriminatory intent in striking the seven prospective black jurors. A prosecutor cannot undermine a pattern of strikes that appears racially motivated by merely pointing to a lone juror of a different race whom he also found objectionable. A prosecutor also cannot "rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections." Batson, 476 U.S. at 98 ....

App. 31.[21] The nature of the prosecution's case also supports the *prima facie* showing, because it depended heavily on the jury's evaluation of the relative credibility of white police officers, who testified that Respondent confessed to them, versus this African-American defendant, who testified that he did not confess. App. 31-32; see also App. 7-10 (discussing trial evidence); Counterstatement of the Case, supra (same).[22]

Based on these considerations, the Third Circuit had "little difficulty in concluding that Holloway met his burden under the first step of the Batson analysis," i.e., Respondent established a *prima facie* case. App. 30. Indeed, as stated above, the **Commonwealth conceded that a *prima facie* case exists** and told the Third Circuit it is "not defending the prima facie case question." Transcript of Oral Argument at 48, 52.[23]

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[21]See also Riley v. Taylor, 277 F.3d 261, 283 (3d Cir. 2001) (en banc) ("Where relevant information ... is in the possession of one party and not provided, then an adverse inference may be drawn that such information would be harmful to the party who fails to provide it").

[22]A jury selection training videotape prepared by this prosecutor's office near the time of this trial, see note 23, infra, urges prosecutors to strike African-Americans on the assumption that they are less likely to trust the police. See A749-50.

[23]Respondent notes that there are additional circumstances apparent from the trial record, but not relied on by the Third Circuit, that further support the *prima facie* case. For example, the prosecutor's high strike rate was against people of the same race as Respondent, making this "one of the easier cases to establish both a *prima facie* case and a conclusive showing that wrongful discrimination has occurred," Powers v. Ohio, 499 U.S. 400, 417 (1991), and jury selection occurred just two weeks after Batson was decided, at a time when prosecutorial discrimination in jury selection was still "widespread" and "common," Batson at 101 (White, J, concurring); id. at 103 (Marshall, J, concurring).

Moreover, additional information, further supporting the Batson claim, emerged during post-conviction proceedings, but was not considered by the Third Circuit. App. 32 n.11. The District Court ordered the Commonwealth to produce (in discovery) the prosecutor's personal, handwritten notes from jury selection. These notes show that the prosecutor recorded the race of every potential juror and that he struck an African-American woman on the race-based assumption that a "young black female" would "relate to" an African-American defendant. The prosecutor's personal notes thus confirm that race played an important role in his jury selection decisions. Respondent also introduced a jury selection training videotape that was prepared by this prosecutor's office (the Philadelphia District Attorney) near the time of this trial and released to the public in 1997. The

Once a *prima facie* case is established, the prosecutor must give race-neutral "explanation[s] for striking the black venirepersons from the venire panel." App. 34; accord App. 26, citing Miller-El, 537 U.S. at 328-29; Batson 476 U.S. at 98. As stated above, when Respondent raised the Batson claim during jury selection, the prosecutor "elected to make a record of his reasons for [just] three" of his strikes against African-Americans, and did not offer "any explanation at all for eight of his eleven strikes" against African-Americans. App. 34.[24]

Given the existence of a *prima facie* case and prosecutor's failure to provide any reasons for eight of his strikes against African-Americans, the Third Circuit could have granted Batson relief without any further analysis, as the Commonwealth admits. See *Petition* at 16 (under Batson, "an unrebutted prima facie case entitles the objector to relief"); Batson, 476 U.S. at 100 (same).

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training videotape urges office prosecutors to use racially discriminatory jury selection practices, urges them to keep track of potential jurors' races (as this prosecutor did) so they will know how many blacks and whites remain available for strikes or selection, and threatens them with being fired if they do not use such discriminatory jury selection practices. Respondent also introduced a study of jury selection practices in this prosecutor's office which documents that office's racial discrimination in jury selection, and shows that the office's jury selection practices conform to the racially-discriminatory pattern urged by the above-described training videotape; affidavits from experienced defense attorneys stating that the office's prosecutors have routinely discriminated against African-Americans in jury selection; and a statement by a Philadelphia trial judge, later a Pennsylvania Supreme Court Justice, who described her experience "as one of the most active trial judges on the bench in trying jury trials" that "the practice" of this prosecutor's office was to strike African-Americans. This information shows that this prosecutor's office, at the time of this trial, was a place where a prosecutor who was "of a mind to discriminate," Batson, 476 U.S. at 96-97, was free and even encouraged to do so. It, at least, suggests a "culture of discrimination" in the office, and supports the Batson claim. Miller-El v. Cockrell, 537 U.S. 322 334-35 (2003) (similar evidence supports Batson claim).

[24]The "parties agree that the prosecutor is psychiatrically disabled and has been for some time, and thus would be unable to testify meaningfully at a hearing" or now give any reasons for his strikes. App. 36-37; see also App. 138 (stipulation that prosecutor is psychiatrically disabled, incapable of testifying, and claims no recollection of case). The Third Circuit found that it "cannot fault" Respondent for the prosecutor's unavailability, since Respondent "has pursued the Batson argument at every stage of this case since the time of trial in 1986." App. 37. This is particularly appropriate because the prosecutor was given a contemporaneous opportunity (during jury selection) to provide reasons, and declined to do so for eight strikes.

Moreover, the reasons the prosecutor gave for the three persons for whom he did give reasons (Mr. Keel; Mr. Hackley; Ms. Baldi), were not facially race-neutral; instead, they were facially race-based – the prosecutor included the potential juror's race as part of his reason for the strike. A29 ("black male"; "black juror, black male juror"; "black female"). Based on the lack of race-neutrality in the three explanations given, the Third Circuit, again, could have granted Batson relief without further ado. Purkett v. Elem, 514 U.S. 765, 767-68 (1995).

The Third Circuit, however, did not grant relief on either of these two grounds on which it could have granted relief. Instead, the Third Circuit gave the Commonwealth the benefit of the doubt as to the possible existence of race-neutral reasons (which the prosecutor never gave). The Third Circuit stated: "Although we are troubled by the lack of race-neutrality in each of the prosecutor's explanations, and perhaps more troubled by the lack of any explanation at all for eight of his eleven strikes, the explanation given as to venireperson John Hackley, Sr., was plainly insupportable under Batson and warrants relief." App. 34.

The Third Circuit first noted that "the question of whether a prima facie case has been established becomes moot, and thus need not even be addressed, when the prosecutor provides explanations for the strikes." App. 33, citing Third Circuit precedent and Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion). Since the prosecutor provided his purported reason for striking Mr. Hackley, the Third Circuit could address Batson's steps two and three regarding Mr. Hackley without even deciding the *prima facie* case question. App. 33-34.

The Third Circuit then reviewed the reason the prosecutor gave for striking Mr. Hackley: "The prosecutor explained the Hackley strike on the ground that Hackley 'is a black juror, black male juror approximately the same age as the defendant.' In other words, the prosecutor cited Hackley's race, age, and gender as the reasons for the strike." App. 34. Again, the Third Circuit could have stopped right there and granted relief, since "the prosecutor cited Hackley's race ... as

[one of] the reasons for the strike," and "[r]ace, obviously, was impermissible." App. 34. Again, the Third Circuit gave the Commonwealth the benefit of the doubt – the court "assume[d]" that the prosecutor's reason was facially race-neutral and that he "referred to Hackley's race merely as concession that Hackley was black so that his race would be clear as a matter of record." App. 34.

After making these multiple assumptions in the Commonwealth's favor, the Third Circuit decided Batson's step three, which required the court to decide if the prosecutor's stated reason (other than race) for striking Mr. Hackley was "pretextual." App. 34-35. In making this step three decision, the Third Circuit examined "the record as a whole," App. 35, as required by this Court's precedent. Miller-El, 537 U.S. at 340. In particular, the Third Circuit noted that a "comparison between a stricken black juror and a sitting white juror is relevant to determining whether the prosecution's asserted justification for striking the black juror is pretextual." App. 34-35 (quoting Third Circuit authority); accord Miller-El, 537 U.S. at 343-45.

The Third Circuit then evaluated the prosecutor's claim that he struck Mr. Hackley because he was "a black juror, black male juror approximately the same age as the defendant," App. 34, in light of the fact that "the prosecutor accepted three white jurors approximately the same age as Holloway, two of whom were males" and "chose not to exercise a peremptory strike against four other white jurors (one male) of approximately the same age who ultimately did not serve on the jury," App. 35. The Third Circuit found that the prosecutor's acceptance of several "white jurors who possessed the same characteristic [as Mr. Hackley] indicates that [the prosecutor's] explanation [for striking Mr. Hackley] was pretextual." App. 35.

The Commonwealth asked the Third Circuit to speculate that the prosecutor had reasons for striking Mr. Hackley different from the reason the prosecutor actually gave for that strike. App. 35. The Third Circuit properly rejected "the Commonwealth's attempt to recast the prosecutor's stated reasons." App. 36. However, the Third Circuit went on to again give the Commonwealth the benefit

of the doubt, and assumed that it should look for reasons other than those the prosecutor actually gave. Even then, Batson relief was required:

> We find nothing in the prosecutor's explanation of the Hackley strike, or in the record as a whole, to indicate that he harbored anything but a discriminatory intent to remove Hackley because of his race.
>
> * * *
>
> On this record, we could not impute a proper motive to the prosecutor's action even if it were proper to hypothesize potential reasons for the strike beyond those given. Relief, therefore, must be granted.

App. 35-36.

The Commonwealth has nothing to complain about here. The Third Circuit found a *prima facie* case, and the Commonwealth conceded that this finding is appropriate. Given the existence of a *prima facie* case, the Third Circuit could have granted Batson relief based on the prosecutor's failure to give any reasons for eight of his strikes against African-Americans. Instead, the Third Circuit made numerous assumptions in the Commonwealth's favor – e.g., assuming that facially race-based reasons are actually race-neutral; assuming that a reviewing court should ignore the prosecutor's stated reasons and speculate that he had reasons other than those he gave. Even with all of those assumptions in the Commonwealth's favor, relief "must be granted" under Batson. The Commonwealth discriminated on the basis of race when it selected Respondent's jury.

C. The Commonwealth Has Distorted the Third Circuit's Actual Discussion of the State Court Ruling; the Actual Discussion is Unobjectionable.

In its attempt to persuade this Court to grant *certiorari*, the Commonwealth has distorted the Third Circuit's opinion into something that is far different from, and in pertinent respects the opposite of what the Circuit actually wrote. Even if the Circuit's *dicta* about the state court ruling were an appropriate issue for *certiorari* review (they are not), the Circuit's actual discussion – as contrasted to the Commonwealth's distortion of that discussion – is correct and unobjectionable.

As the Third Circuit pointed out, in Holloway-2 the Pennsylvania Supreme Court applied a rigid rule requiring that, in every case involving a Batson challenge, the defendant must identify the race of every venireperson stricken by the Commonwealth, the race of venirepersons accepted by the Commonwealth but stricken by the defense, and the racial composition of the final jury, before the court will even consider whether the defendant has established a *prima facie* case. App. 37, citing Holloway-2, 739 A.2d at 1045. The Third Circuit noted this Court's contrasting holding, in Batson itself, that a *prima facie* case may be based on the facts that the prosecutor has used peremptory challenges to remove minority venire members; that peremptory challenges permit those to discriminate who are of a mind to do so; "and any other relevant circumstances [that] raise an inference" that the prosecutor intended to discriminate on the basis of race. App. 40-41, quoting Batson, 476 U.S. at 96-97; see also Miller-El, 537 U.S. at 342-47 (comparative analysis of stricken and non-stricken jurors, disparate questioning of minority jurors, and historical evidence of racial discrimination supported inference of discrimination). Given Batson's "fluid" standard for assessing a *prima facie* case, App. 41, the Third Circuit found that the state court's rigid rule was inconsistent with Batson. App. 41-44.

The Commonwealth turns this analysis on its head. According to the Commonwealth, the Third Circuit "declared that certain kinds of evidence are irrelevant to Batson claims." *Petition* at 18. The Commonwealth says this – without any citations – over and over again. Id. at 7 ("The Third Circuit has taken an extremely narrow view of Batson relevance"); id. (Third Circuit's "cramped view of ... proper evidence"); id. at 9 ("extremely narrow view of Batson relevance"); id. at 19 (under Third Circuit decision, courts would act unlawfully "if they even *consider* the race of jurors accepted by the lawyer accused of discrimination.") (emphasis original).

This often repeated assertion, however, is simply false. The rule applied by the Third Circuit – directly following Batson itself – is one that considers all "relevant circumstances [that] raise an

inference ... of purposeful discrimination," Batson, 476 U.S. at 96-97, including both evidence as to the pattern of strikes, and other relevant evidence. As the Third Circuit pointed out, it was the state court that excluded other relevant evidence by requiring a detailed showing of all veniremembers' races in every case:

> [A] defendant's Batson objection need not always be based on a "pattern" of strikes; it can be based, for example, on a single strike accompanied by a showing that the prosecutor's statements and questions to the juror (or to prior jurors) support an inference of discrimination. Requiring a defendant in that circumstance to identify "the race of all the venirepersons removed by the prosecution" is not necessary to support a prima facie case ....

App. 42.

The Commonwealth attempts to distort the Third Circuit's actual statement – that detailed racial data is not necessary in every case – into a statement that such data is irrelevant by taking a single passage out of context. Near the end of its discussion, the Third Circuit made the following remarks:

> [E]vidence of "the race of jurors acceptable to the Commonwealth who were stricken by the defense," finds no place in the prima facie case, as defense strikes are irrelevant to the determination of whether the prosecutor has engaged in discrimination.

App. 43, quoting Commonwealth v. Simmons, 662 A.2d 621, 631 (Pa. 1995).

The only racial data that the Third Circuit actually said were irrelevant were the races of those jurors stricken by the defense. The Commonwealth, however, cites this discussion as showing that the Third Circuit "held that the race of jurors accepted by the lawyer accused of discrimination, and seated on the jury or struck by the other side, is *irrelevant*." *Petition* at 18 (emphasis original), citing App. 43. This is false – what the Third Circuit said (not held) is that the race of jurors stricken by the defense is irrelevant to whether the prosecutor discriminated. That statement is clearly correct; it is surely not a worthy subject for *certiorari* review.

Ignoring the Third Circuit's actual application of *de novo* review, the Commonwealth then

asserts that the Pennsylvania Supreme Court's decision was reasonable, and that the "only question here is whether the state court's rejection of the Batson claim" could survive review under the AEDPA. *Petition* at 13. The Commonwealth, however, has not attempted to show that the Third Circuit's application of *de novo* review was wrong, or asked this Court to review that question.[25]

The Commonwealth also engages in a hypothetical discussion of ways in which prosecutors could be "trapped" into findings of discrimination, in cases where the Batson claim is raised post-trial, and the prosecutor had no adequate opportunity to rebut the *prima facie* case. *Petition* at 15-16. That discussion, however, is irrelevant to this case. Here, the record as to the race of the jurors stricken by the prosecutor was made during voir dire. See App. 27-29, 105; note 19, supra. Here, the trial court asked the prosecutor "Does the Commonwealth have anything to say?" (providing the prosecutor an opportunity to rebut any inference of discriminatory intent) after the defense objected to the prosecutor's pattern of strikes. App. 28. Here, the Commonwealth conceded at oral argument that a *prima facie* case was established. Here, the prosecutor volunteered reasons for three of his strikes, and the Third Circuit found the reason proffered as to Mr. Hackley to constitute a pretext for discrimination. App. 34-36. Here, the Third Circuit considered and rejected the speculative reasons for that strike suggested years later by the Commonwealth. Id. The purely hypothetical potential effects of *dicta* expressed by a lower court do not constitute grounds for *certiorari* review.

Finally, the Commonwealth complains that the Third Circuit's review of the Hackley strike

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[25]The Commonwealth attempts to raise another issue not fairly included in the questions presented, arguing that the rule applied by the state court would constitute an adequate and independent procedural default. *Petition* at 13-14 n.6. Given that the trial in this case took place two weeks after Batson, a rule concerning the record required for a Batson challenge that was not in existence then could not possibly have been adequate and independent. See Ford v. Georgia, 498 U.S. 411 (1991) (rule concerning method of making Batson objection that was developed after trial could not be retroactively applied to defendant; fact that rule was reasonable was irrelevant). In any event, the Commonwealth cannot obtain *certiorari* review of issues not fairly included in the questions presented, but merely dropped into footnotes. Supreme Court Rule 14.1(a).

was improper, because the Third Circuit initially declined to consider reasons not offered by the prosecutor at trial that the Commonwealth thinks it can glean from aspects of the record now. *Petition* at 20-21 & n.8, citing the trial record and the prosecutor's notes.[26] Consistent with Third Circuit precedent, the Third Circuit held that "where a prosecutor makes his explanation for a strike a matter of record, our review is focused solely upon the reasons given." App. 35-36, citing Riley v. Taylor, 277 F.3d at 282. The Third Circuit also considered and rejected, however, the Commonwealth's contention that the trial record disclosed non-discriminatory reasons for the strike that were not articulated by the trial prosecutor. App. 36.

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[26]The Commonwealth is not in a position to complain about the fact that the Third Circuit declined to consider the prosecutor's handwritten notes. Those notes fill in all the details of juror race about the absence of which the Commonwealth elsewhere complains so vigorously, making it even more clear that the pattern of strikes raises an inference of discrimination. App. 32 n.11. Moreover, the notes indicate that the prosecutor struck an African-American juror because she was a "young black female," about whom the prosecutor made the stereotypical assumption that she would "relate to" Respondent. The prosecutor's notes were obviously in the Commonwealth's possession throughout the proceedings. They prove discrimination, not the reverse. The Commonwealth's attempt to rely on them now betrays its desperation.

CONCLUSION

For all of the reasons stated above, this Court should not grant *certiorari*. The Third Circuit's review of Respondent's Batson claim is thorough, careful and correct. The Commonwealth asks this Court to find fault with a few of the many issues addressed by the Third Circuit. As shown above, however, those rulings were not crucial to the judgment of the Third Circuit. Moreover, the Commonwealth has utterly failed to show any error committed by the Third Circuit, much less any important question of federal law that this Court should resolve.

Respectfully submitted,

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I, MATTHEW C. LAWRY, certify that on this 27th day of September, 2004, I have caused the foregoing brief in opposition to be served by FIRST CLASS MAIL on the following person:

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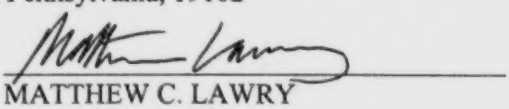

MATTHEW C. LAWRY

(3)

NO. 04-101

Supreme Court, U.S.
FILED
OCT 2 0 2004
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, PH.D., Secretary, DOC; DAVID DiGUGLIELMO, Superintendent, SCI-Graterford; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

ARNOLD HOLLOWAY,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY

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ARGUMENT IN REPLY

The central issue in this case is simply stated: The Third Circuit should have deferred to the state court's resolution of the Batson[1] issue. The Pennsylvania Supreme Court examined and rejected Holloway's Batson claim on collateral review in 1999. Under the federal habeas statute, that decision is owed deference. See 28 U.S.C. § 2254(d). The Third Circuit, however, refused to defer.[2] As explained in the *Petition*, this was clearly wrong, because nothing in the state court's decision was contrary to, or an unreasonable application of, Batson.

Holloway's response takes an entirely different approach. He effectively ignores the deference issue, and barely acknowledges the state court's decision at all.[3]

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

[2] This is not an isolated error – courts in this Circuit have refused to defer to state courts' rejection of Batson claims in other cases as well. See, e.g., Hardcastle v. Horn, 368 F.3d 246 (3d Cir. 2004), petition for *certiorari* filed, No. 04-448 (U.S.).

[3] Holloway buries his short discussion of the state court's analysis near the very end of his response. See *Response* at 28. Even there, he does not actually address the deference question; he simply says the state court's ruling was "inconsistent" with Batson. He never cites the "contrary to, or … unreasonable application of" language of 28 U.S.C. § 2254(d), even in this section of his brief.

Instead, he engages in classic misdirection. He chops the Third Circuit's decision into many small, separate issues, and argues that the Commonwealth should have framed a separate *certiorari* request for every different part of the legal maze he has constructed. He also insists on litigating, one more time, the merits of the Batson claim – never mentioning that, in addition to the state court's rejection of the claim, the district court considered and rejected these same arguments, again demonstrating that the state court's rejection of the claim, based on a lesser, inadequate record which Holloway failed to develop, was reasonable.

Holloway's approach ignores common sense – it is as if he has not read the *Petition* to which he responds. Most remarkably, Holloway repeatedly insists that the Commonwealth does not challenge the Third Circuit's decision to review the Batson claim *de novo*. This is absurd. Of course the Commonwealth challenges the lack of deference – that is the whole point. As stated in the *Petition*, "[t]he only question here is whether the state court's rejection of the Batson claim was contrary to, or an unreasonable application of, this Court's Batson decisions." *Petition* at 13. The Third Circuit failed to abide by this standard, and that is the focus of the Commonwealth's challenge. The panel offered several reasons for not deferring to the state court's decision -- most importantly, the court held that Pennsylvania's record-preserving requirement for Batson claims is unconstitutional (App. 37-45), and that the Batson claim had been exhausted on direct appeal (App. 14-22). In the *certiorari* petition, the Commonwealth challenges both of these arguments. See *Petition* at 7-17 (Pennsylvania record-making requirement is reasonable application of Batson); id. at 22-30 (Holloway's improper *pro se* supplemental brief did not serve to exhaust the Batson claim on direct appeal).

Holloway's argument that the Commonwealth was obligated to frame an additional, separate challenge to the Third Circuit's application of *de novo* review makes no sense.

Holloway's long, one-sided discussion of the merits, *Response* at 19-27, is another attempt at misdirection. He argues his case as if it had never been rejected by the state supreme court, or even by the district court. He does not mention that almost *none* of this evidence was presented to the state courts, or that Holloway completely failed to develop the record until he came to federal court. He does not even hint at the real issue – whether the state court's contrary view of the merits, based on the record before it, was *unreasonable*. Instead, he tries to create a cloud of misconduct and error that will sweep away any obstacles to relief.

But Holloway's broad discussion of the merits is selective, misleading, and often downright false. He claims, for example, that the prosecutor "gave no reason at all" for eight of his peremptory challenges, *Response* at 21; he entirely fails to mention that (1) the trial court *rejected* the claim without requiring the prosecutor to give any explanations; and (2) Holloway failed *for years* to ask for a Batson hearing, or to supplement the record at all, even when he had the opportunity to present evidence on collateral review. Now, of course, it is too late, both because the federal habeas statute prohibits further factual development where the petitioner failed to develop the facts in state court,

28 U.S.C. § 2254(e)(2), and because the prosecutor is now dead and cannot defend himself.[4]

Perhaps the most maddening part of Holloway's discussion of the merits is his insistence, repeated again and again, that the Commonwealth "conceded" at oral argument in the Third Circuit that Holloway had shown a *prima facie* case of discrimination. *Response* at 19, 21, 22, 23, 27. This is *false*. The Commonwealth argued that the state court could not have found a *prima facie* case from the evidence that was actually in the record. The Commonwealth also argued, with respect to the new evidence introduced in federal court, that (1) this evidence never should have been admitted, because Holloway had failed to present it to the state courts, and (2) even with all this new evidence, a court could have rejected the presence of a *prima facie* case. The Commonwealth filed a post-argument statement (which was accepted by the Court of Appeals) in which it specifically stated that it *did not concede* the existence of a *prima facie* case, for the same reasons. See Holloway v. Horn, No. 01-9009 (3d Cir.), Docket Entries of November 24 and 25, 2003; Clarification Statement at 1-2. Throughout the lengthy briefing in this case, the Commonwealth consistently defended the district court's holdings, including that there was no *prima facie* case of discrimination. Commonwealth's Second Step Brief, Nos.01-9009 and 01-9010, at 55-59, 65-84. The Third Circuit obviously did not think this was a

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[4] At the time of the district court's decision, the trial prosecutor, Drew Barth, had become psychologically disabled and was unable to testify. App. 138. He has since died.

conceded point – that is why the court explored the issue in depth and made a finding that Holloway had made a *prima facie* showing, rather than simply noting the Commonwealth's "concession." App.30-33.

Apart from his peculiar assertion that the Commonwealth has not challenged the Third Circuit's decision to invoke *de novo* review, and his misleading and incomplete discussion of the merits, Holloway makes several additional procedural arguments that are rather difficult to understand. He insists that the Commonwealth has "not challenged" either the Third Circuit's holding that "there was no adequate bar to federal review," or its holding that his Batson claim was "exhausted both on direct appeal and in state post-conviction proceedings." *Response* at 7 (emphasis omitted).

It is easy to see why these complaints do not matter. It is indisputable that the Pennsylvania Supreme Court addressed the Batson claim, on collateral review, as it rejected Holloway's claim of counsel's ineffectiveness. The state court's Batson decision *must* be taken into account, whatever procedural arguments Holloway's counsel might conjure. This is a matter of statutory language. The habeas statute requires that the writ *not be granted* unless the state court's adjudication was an unreasonable application of, or contrary to, this Court's precedent. 28 U.S.C. § 2254(d)(1). Even if Holloway's complicated procedural analysis were entirely correct, he *still* must show that the state court's adjudication of the Batson claim fails the deference test.[5]

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[5] This Court has explained that where a state court disposes of a claim on both procedural and substantive grounds, both

(continued ...)

Holloway never responds to this point; he attempts to direct this Court's attention away from the obvious issues, and into the procedural cul-de-sac of his own creation. He does briefly assert (without much argument) that the state court did not "adjudicate" the Batson claim, because its record-making requirement was procedural rather than substantive. *Response* at 4, 18. In the *Petition*, as part of the first *certiorari* question defending the Pennsylvania record-making requirement, the Commonwealth explains that actually this was a substantive ruling, but even if it were procedural, it was fully adequate. *Petition* at 12-14 & n.6. The Commonwealth will not repeat that analysis here. It is worth noting, however, that Holloway completely fails to acknowledge that he had every opportunity to preserve his

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grounds must be assessed independently, to the extent possible, in later federal habeas review. Harris v. Reed, 489 U.S. 255, 264 n.10 (1989)(independent, alternative state procedural ruling must stand even where state court was wrong on merits); see also Holland v. Jackson, 124 S. Ct. 2736 (2004) (*per curiam*) (where state court rejected claim both on procedural grounds and on the merits, federal habeas court must analyze *both* holdings independently). If the state court's procedural analysis is found to be invalid by a federal court, its alternative substantive holding also stands on its own and must be assessed under the deferential habeas standard. Otherwise, state courts would have every incentive to avoid reliance on procedural rules, for fear that an invalid procedural disposition would also wipe away any alternative substantive ruling.

claim on collateral review. He had an evidentiary hearing, but he did not even *try* to introduce any evidence to comply with Pennsylvania's record-making requirement, even though he (or his counsel) obviously knew about the record-making requirement by then. Since the "adequacy" inquiry is ultimately about safeguarding the claimant's *opportunity* to make constitutional claims, that ends the matter – Holloway had every chance to make the record, but he chose not to do so.

In one of Holloway's other procedural arguments, he relies on the Third Circuit's "no procedural default" holding. This holding arises from a slip-of-the-tongue mistake by the Pennsylvania Supreme Court, which stated that Holloway had not raised the Batson claim in the lower court during collateral review – when, in fact, he had raised it in the lower court but not on *direct appeal*. This error did not change the analysis of the claim at all.[6] Furthermore, this argument

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[6] This brief mistake appears in the state supreme court's 1999 decision. See Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999). This error did not change the state supreme court's ineffectiveness analysis, which, after all, was based on its rejection of the underlying Batson claim. 739 A.2d at 1045. The Commonwealth has never relied on, or tried to enforce, this supposed never-raised-in-the-lower-court default. Indeed, no one even mentioned this mistake until Holloway raised it in his briefing before the Third Circuit. Despite Holloway's urging, this inconsequential drafting error does not give the federal courts license to ignore *everything* the state court actually said about the Batson issue.

leads Holloway into a predicament. He pretends that the Third Circuit's default holding – which takes up a total of one page of its opinion – freed it to entirely ignore everything else done in state court. But the Third Circuit did *not* ignore everything else. If Holloway is right, then all of the Third Circuit's subsequent discussion of exhaustion, and the state record-making requirement, and other points relating to the state proceedings – the lion's share of the opinion below – was all *dicta*. The Third Circuit obviously did not think it was *dicta*. See, e.g., App. 14 (after default holding, Third Circuit states "We *must* next determine whether Holloway exhausted state court remedies") (emphasis added).[7] Furthermore, even if Holloway is entirely correct and the Third Circuit wrote a mostly irrelevant advisory opinion, the same fundamental problem remains – the state courts actually decided the Batson claim, and under the habeas statute that decision must be deferred to unless it was somehow contrary to Batson.

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[7] The notion that most of the opinion below is *dicta* represents a stark about-face by Holloway's lawyers. The same institutional counsel who represent Holloway in this matter, and who represent virtually all death-sentenced Pennsylvania prisoners in federal habeas proceedings, have strenuously argued to local federal courts that these portions of the Third Circuit's opinion are *binding precedent*. See Rivers v. Horn, No. 02-1600 (E.D. Pa.), Petitioner's Response to the Commonwealth's Response to Petitioner's Reply, at 24 (habeas relief "required" under Third Circuit's Holloway decision because state court relied on same Batson record-making requirement invalidated in Holloway).

In sum, Holloway attempts to convert this case into an impenetrable mess – but he obscures the real issues, which are very real, easily identifiable, and quite disturbing. The Third Circuit has invalidated Pennsylvania's Batson record-making requirement, which has been one of the primary means by which Pennsylvania appellate courts have managed Batson claims over the years. The Third Circuit has also declared irrelevant large categories of evidence upon which the prosecution (and other litigants accused of Batson-style discrimination) commonly rely.[8] Finally, the Court of Appeals has substituted its own view of state procedure – that capital defendants could file otherwise improper *pro se* supplemental briefs in the Pennsylvania Supreme Court – for that of the actual Pennsylvania Supreme Court, which never

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[8] Holloway argues that the Third Circuit did not mean what it said about certain kinds of evidence being irrelevant to Batson – specifically, the race of jurors accepted by the prosecutor but challenged by the defense, or the race of jurors accepted by the prosecutor and ultimately seated by the jury. *Response* at 27-30. The Commonwealth stands by its earlier analysis of these holdings. Simply put, the Third Circuit explicitly refused to *consider* these facts despite the Commonwealth's presentation of them. See App. 42-43 ("The final composition of the jury … offers no reliable indication of whether the prosecution intentionally discriminated…"; "defense strikes are irrelevant to the determination of whether the prosecution has engaged in discrimination…"). Even if *de novo*, non-deferential review were appropriate, the Third Circuit's decision should be reversed on that basis alone.

announced such a rule.[9] These are not "trivial" matters, and they are not somehow insulated from review by the absence of several additional *certiorari* questions.

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[9] With respect to the Third Circuit's holding that Holloway's late, improper supplemental *pro se* brief exhausted his Batson claim on direct appeal, the Commonwealth will continue to rely on the discussion in its *Petition*. *Petition* at 22-30. Significantly, Holloway does not even dispute that he *never mentioned* this *pro se* brief during all the subsequent years of state court litigation, or during the voluminous briefing before the district court. Nor does he dispute that his failure to mention the *pro se* brief in his pleadings before the district court was a clear violation of Local Rule 9.4(2)(b) (habeas petition filed by death-sentenced prisoner "must identify at what stage of the proceedings each claim was exhausted in state court ...").

CONCLUSION

For the reasons set forth above, as well as the reasons given in their initial brief, petitioners respectfully request that this Court grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

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